LITIGATION SECTION
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California State Bar Litigation Section Comments

Judicial Council Task Force on Jury Instructions

Civil Jury Instructions, Fourth Set

Committee on Jury Instructions
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Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not remove the notebooks from the jury box at any time during the trial. You may take your notes into the jury room during deliberations. ~~[At the end of the trial you may take your notes with you. If you leave them here they will be destroyed.]~~

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. ~~Do~~ It is your independent recollection of what happened during the trial that should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if ~~they are different~~ those notes differ from what you remember.

The court reporter is making a record of everything that is said. If during deliberations you have a question about what the ~~testimony~~ witness said, you ~~may~~ should ask that the court reporter's ~~notes~~ record be read to you. You must accept the court reporter's ~~notes~~ record as accurate.

SOURCES AND AUTHORITY

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious note. ... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back ... .' " (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152], internal citations and footnote omitted.)

State Bar Committee Comments on Proposed Changes:

We believe the bracketed language in the first paragraph should be eliminated. We are aware of no court that encourages, or even suggests to the jurors that they should take their trial notes home. In fact, we believe it is inappropriate to allow jurors to take their notes out of the courtroom until after deliberations. It would seem that to even suggest that jurors might retain their handwritten notes can only lead to possible abuse and attacks on the verdict. In addition, in those cases in which certain evidence was subject to a protective order, or other restriction on its dissemination outside of trial, retention of notes by jurors would render enforcement of the protective order difficult, if not impossible.

The change in language in the second paragraph, lines 7-13, makes the admonition more explicit and re-emphasizes the need for the jurors to be independent.

The insertion of the language making it clear that the request for re-reading of the court report's record is only during deliberation eliminates an ambiguity that otherwise exists in the instructions.

We believe the phrase "what the witness said" is preferable to "testimony".

The change of "may" to "should" is consistent with the language of the authorities cited. If the jury has some confusion concerning a witness' testimony it is their obligation to ask for the record to be read back to them.

We believe that the use of the phrase "court reporter's record" should be consistent rather than the use of the word "notes".

109
Service Provider for Juror With Disability

During trial, [*name of juror*] will be assisted by a [*insert service provider*]. The [*insert service provider*] is not a member of the jury and ~~you may not discuss this case with [him/her] at any time~~ is not to participate in the jury deliberations in any way other than to provide the service to [name of juror].

DIRECTIONS FOR USE

This instruction should be read along with other introductory instructions at the beginning of the trial if appropriate.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: … Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

State Bar Committee Comments on Proposed Changes:

The substituted language is more consistent with what actually will be happening in the jury room; whereas the draft language is confusing. For example, a service provider to a hearing or speech impaired juror obviously will have to discuss the case with the jurors in a literal sense.

215A
~~Privilege Against Self-Incrimination~~ Exercise of Witness' Right Not To Testify

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[*Name of party/witness*] has exercised [his/her] legal right not to testify concerning certain matters. Do not let the exercise of this right affect any of your decisions in this case and do not draw any negative conclusion from [his/her] exercising this right not to testify. A [party/ witness] may exercise this right freely and without fear of penalty.

DIRECTIONS FOR USE

Citing *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350], courts have stated the following: "When a claim of privilege made on this ground in a civil proceeding logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." (*Shepherd v. Superior Court* (1976) [130 Cal.Rptr. 257], internal citation omitted.) However, Assembly Committee on the Judiciary's comment to Evidence Code section 913 states: "There is some language in *Fross v. Wotton* ...that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."

SOURCES AND AUTHORITY

- Evidence Code section 913 provides:

  (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.
  (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise

of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

- Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

- Evidence Code section 930 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

- "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653], internal citation omitted.)

- "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)

- "The Fifth Amendment of the United States Constitution includes a provision that '[n]o person ... shall be compelled in any criminal case to be a witness against himself, ...' Although the specific reference is to criminal cases, the Fifth Amendment protection 'has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], internal citation and footnote omitted.)

- "There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. 'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.' " (*Brown, supra,* 180 Cal.App.3d at p. 708, internal citations omitted.)

- "It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action. However, while the privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 [204 Cal.Rptr. 864], internal citations omitted.)

- "The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, 'two separate and distinct testimonial privileges' exist under this guarantee. First, a defendant in a criminal case 'has an absolute right not to be called as a witness and not to testify.' Second, 'in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.' " (*People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759], internal citations omitted.)

Secondary Sources

- 2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 96, p. 347

State Bar Committee Comments on Proposed Changes:

We believe the change in caption and the inserted language more fully capture the full implications of the language of Section 913 of the Evidence Code.

316C
PARTICIPANT IN A SPORTS ACTIVITY

[Name of Plaintiff] claims [he/she] was harmed while participating in the sports activity of [describe sport] and that [name of defendant] is responsible for that harm. To establish this claim, [name of plaintiff] must prove the following:

1. **That [name of defendant] unreasonably increased the risks of harm beyond those inherent in the sport of [name of sport]. An inherent risk of a sport is one that cannot be eliminated without (1) deterring vigorous participation in the sport or (2) fundamentally altering the nature of the sport;**

2. **That [name of plaintiff] was harmed; and**

3. **That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff] harm.**

DIRECTIONS FOR USE

In June 2002, the California Supreme Court accepted review of *Kahn v. East Side School District*, which involves application of assumption of risk to the coach-student situation. This case may have bearing on this instruction.

SOURCES AND AUTHORITY

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk … bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11, 45 Cal.Rptr.2d 855, internal citations omitted.)

- "'[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as co-participant, coach, premises owner or spectator support the legal conclusion of duty."

(*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88, 112 Cal.Rptr.2d 185, internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of foreseeability among other factors) a particular defendant breached that duty of care, which is essentially factual matter." (*Kockeman v. Segal* (1998) 61 Cal.App.4th 491, 498, 71 Cal.Rptr.2d 552.)

- "Primary assumption of risk is merely another way of saying no duty of car is owed as to risks inherent in a given sport or activity." *(Wattenberger v. Cincninnati Reds, Inc.*) (1994) 28 Cal.App.4th 746, 751, 33 Cal.Rptr.2d 732.)

- "A property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citations]. in the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315, 834 P.2d 696, 11 Cal.Rptr.2d 2.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in the sporting activity. The Supreme Court has stated that 'it is well established that defendants generally do have a duty to use due care *not to increase the risks to a participant over and above those inherent in the sport*.' Thus, even though 'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' they may not increase the likelihood of injury above that which is inherent.'" (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261, 102 Cal.Rptr.2d 813, internal citations omitted, emphasis in original.)

- "The *Knight* exception applies when the defendant increased the *risk of injury* beyond that inherent in the sport, not when the defendant's conduct may have increased the severity of the injury suffered." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116, 96 Cal.Rptr.2d 394, emphasis in original.)

- "The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253, 38 Cal.Rptr.2d 65.)

346
Causation for Asbestos-Related Cancer Claims

[*Name of plaintiff*] is ~~allowed~~ required to prove that exposure to asbestos from [name of defendant]'s product was a substantial factor causing [*name of plaintiff/decedent*]'s illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure contributed to [his/her] risk of developing cancer.

DIRECTIONS FOR USE

This instruction is intended to be given along with Instruction 340, *Causation: Substantial Factor,* and, if necessary, Instruction 341, *Causation: Multiple Causes.*

SOURCES AND AUTHORITY

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the plaintiff or decedent's risk of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16], internal citation and footnotes omitted.)

- "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. If there has been no exposure, there is no causation. Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell*

v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' " (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1406, 1416–1417 [37 Cal.Rptr.2d 902], internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Line 1: *"Allowed to prove" in line 1 is awkward.*

Line 2: *The requirement that the asbestos be from the defendant's product is missing.*

513
Motor Vehicle Owner Liability—Permissive Use of Vehicle

[*Name of plaintiff*] claims that [he/she] was harmed and that [*name of defendant*] is responsible for the harm because ~~[he/she]~~ [*name of defendant*] gave [*name of driver*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of driver*] was negligent in operating the vehicle;**

2. **That [*name of defendant*] was an owner of the vehicle at the time of the injury to [*name of plaintiff*]; and**

3. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle.**

In determining whether permission was given, you may consider the relationship between the owner and the operator. [For example, if the parties are related or the owner and the operator are employer and employee, such a relationship may support a finding that there was implied permission to use the vehicle.]

[If the vehicle owner has given a person permission to use the vehicle, and that person authorizes a third person to operate the vehicle, the third person may be considered to have used the vehicle with the permission of the owner.]

DIRECTIONS FOR USE

Separate instructions will be necessary regarding the negligence of the driver and that it caused harm to the plaintiff. Read bracketed language if appropriate to the facts. If ownership of the vehicle is uncontested, element 2 may be deleted.

SOURCES AND AUTHORITY

- Vehicle Code section 17150 provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the

owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

- Vehicle Code section 17151(a) provides in part: "The liability of an owner … is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person … and … to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person … and is limited to the amount of five thousand dollars ($5,000) for damage to property."

- The statutory limitation under section 17151(a) " does not apply … to a vehicle owner's own common law negligence, as distinguished from the owner's statutory vicarious liability for the operator's negligence." (*Fremont Compensation Insurance Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675–676 [23 Cal.Rptr.2d 567].)

- "[U]nless the evidence points to one conclusion only, the question of the existence of the requisite permission under [section 17150] is one to be determined by the trier of fact, 'upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom.' " (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 51 [17 Cal.Rptr. 828], internal citations omitted.)

- "[P]ermission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership." (*Scheff v. Roberts* (1950) 35 Cal.2d 10, 12 [215 P.2d 925], internal citations omitted.)

- "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence will support a finding of such use than where the parties are only acquaintances or strangers." (*Elkinton v. California State Automobile Assn., Interstate Insurance. Bureau* (1959) 173 Cal.App.2d 338, 344 [343 P.2d 396], internal citations omitted.)

- "There is no doubt that the word 'owner' as used in [the predecessor to Vehicle Code section 17150] for the purpose of creating a liability thereunder, is not synonymous with that word as used in the ordinary sense of referring to a person or persons whose title is good as against all others. Under the Vehicle Code there may be several such 'owners' at any one time. One or more persons may be an 'owner,' and thus liable for the injuries of a third party, even though no such 'owner' possesses all of the normal incidents of ownership." (*Stoddart v. Peirce* (1959) 53 Cal.2d 105, 115 [346 P.2d 774], internal citation omitted.)

- "The question whether the [defendant] was an owner for purposes of imposition of liability for negligence [under Vehicle Code section 17150] was one of fact." (*Campbell v. Security Pacific Nat. Bank* (1976) 62 Cal.App.3d 379, 385 [133 Cal.Rptr. 77].)

- "Strict compliance with Vehicle Code section 5602 [regarding the sale or transfer of a vehicle] is required to enable a transferring owner to escape the liability imposed by section 17150 on account of an accident occurring before notice of the transfer is received by the Motor Vehicle Department." (*Laureano v. Christensen* (1971) 18 Cal.App.3d 515, 520–521 [95 Cal.Rptr. 872].)

- "[T]he true and actual owner of an automobile [is not] relieved from liability by the expedient of registration in the name of another. … It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants … were in fact the true owners of the car and had control of it, the registration being in the name of defendant [driver] for the purpose of avoiding liability." (*McCalla v. Grosse* (1941) 42 Cal.App.2d 546, 549–550 [109 P.2d 358].)

- "[I]t is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential." (*Krum v. Malloy* (1943) 22 Cal.2d 132, 136 [137 P.2d 18].)

- "The immunity of the negligent operator under the [Workers' Compensation] Act does not insulate a vehicle owner who is neither the plaintiff's employer nor co-employee from liability under section 17150. [¶] Since the owner's liability does not arise from the status or liability of the operator, the defenses applicable to the operator are not available to the owner." (*Galvos v. Petito* (1993) 13 Cal.App.4th 551, 554 [16 Cal.Rptr.2d 560].)

- "The doctrine of 'negligent entrustment' is clearly distinguishable from the theory of 'vicarious liability.' Negligent entrustment is a common law liability doctrine. Conversely, the obligation of a lending owner of an automobile is one of statutory liability. An owner of an automobile may be independently negligent in entrusting it to an incompetent driver. California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent

entrustment by enactment of a specific consent statute." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 538 [55 Cal.Rptr. 741], internal citations omitted.)

- For purposes of liability under the permissive use statute, "[s]ince defendant [car owner] had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the [renter] to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him." (*Tuderios v. Hertz Drivurself Stations, Inc.* (1945) 70 Cal.App.2d 192, 198 [160 P.2d 554].)

- "[T]he provisions of Proposition 51 do not operate to reduce the liability of vehicle owners imposed by Vehicle Code section 17150." (*Rashtian v. Brach-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1849 [12 Cal.Rptr.2d 411].)

- "[I]f the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [134 P.2d 788], internal quotation marks and citations omitted.)

- "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." (*Di Rebaylio v. Herndon* (1935) 6 Cal.App.2d 567, 568–569 [44 P.2d 581].)

- "[I]mplied permission to use an automobile may be found even where the owner and permittee expressly deny that permission was given." (*Anderson v. Wagnon* (1952) 110 Cal.App.2d 362, 366 [242 P.2d 915].)

- "[I]n determining whether there has been an implied permission, it is not necessary that the owner have prior knowledge that the driver intends to use the car, but it must be 'under circumstances from which consent to use the car is necessarily implied.' " (*Mucci v. Winter* (1951) 103 Cal.App.2d 627, 631 [230 P.2d 22], internal citation omitted.)

- For purposes of statutory vicarious liability, "if the owner entrusts his car to another he invests him with the same authority to select an operator which the owner has in the first instance. … [¶] … The owner is thus liable for negligent acts by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee, since the foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public." (*Peterson, supra,* 57 Cal.2d at p. 54, internal quotation marks and citations omitted.)

Secondary Sources

- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, §§ 25:44–25:45, pp. 68–71
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.28–4.32, 4.37, pp. 110–114, 116 (rel. 4/00)
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20, pp. 20-110–20-132 (rel.16-3/94)
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1028–1031, 1039, pp. 421–424, 431–433; *id.* (2001 supp.) at §§ 1028–1031, pp. 273–275

State Bar Committee Comments on Proposed Changes:

The changes are all intended to avoid the misleading or confusing use of pronouns in the instructions. Because these instructions deal primarily with vicarious responsibility for the negligent use of vehicles, more clarity is achieved by reducing the number of pronouns and replacing with names.

514
Motor Vehicle Owner Liability
Affirmative Defense—Use Beyond Scope of Permission

[*Name of defendant*] claims that [he/she] is not responsible for the harm to [*name of* plaintiff] because [*name of driver*]'s use of the vehicle exceeded the scope of the permission given. To succeed, [*name of defendant*] must prove the following:

1. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle for a limited time, place, or purpose; and**

2. **That [*name of driver*]'s use of the vehicle substantially violated the time, place, or purpose specified.**

DIRECTIONS FOR USE

This instruction is intended for use when the vehicle owner contends that the use of the vehicle exceeded the scope of the permission, thereby terminating the permission.

SOURCES AND AUTHORITY

- Vehicle Code section 17150 provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

- "[W]here the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. [¶] … On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, insofar as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. … [¶] … [T]he substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time limitations, absolving the owner from liability." (*Henrietta v. Evans* (1938) 10 Cal.2d 526, 528–529 [75 P.2d 1051], internal citations omitted.)

- "[W]here restrictions by the owner as to time, purpose, or area are involved, the owner's permission is considered terminated only where there has been a substantial violation of such restrictions, and it is a question of fact whether under all the circumstances presented, such restrictions as to time, purpose, or area have been substantially violated prior to the occurrence of the accident so as to vitiate the owner's permission and thus absolve him from the vicarious liability imposed under [the predecessor to section 17150]." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 52 [17 Cal.Rptr. 828], internal citations omitted.)

- "What is a substantial deviation from a permitted use is a question of fact under the circumstances of each case." (*Garmon v. Sebastian* (1960) 181 Cal.App.2d 254, 260 [5 Cal.Rptr. 101].)

Secondary Sources

- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.35–4.36, pp. 115–116 (rel. 4/00)
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20[5][c], pp. 20-127–20-129 (rel. 16-3/94)
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1040, pp. 433–434; *id.* (2001 supp.) at § 1040, p. 276

State Bar Committee Comments on Proposed Changes:

The changes are all intended to avoid the misleading or confusing use of pronouns in the instructions. Because these instructions deal primarily with vicarious responsibility for the negligent use of vehicles, more clarity in achieved by reducing the number of pronouns and replacing with names.

515
Adult's Liability for Minor's Permissive Use of Motor Vehicle

[*Name of plaintiff*] claims that [he/she] was harmed and that [*name of defendant*] is responsible for the harm because ~~[he/she]~~ [*name of defendant*] gave [*name of minor*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of minor*] was negligent in operating the vehicle;**

2. **That [*name of plaintiff*] was harmed;**

3. **That [*name of minor*]'s negligence was a substantial factor in causing the harm;**

4. **That at the time of the collision [*name of defendant*] had the right to control [*name of minor*]; and**

5. **That [*name of defendant*], by words or conduct, gave [*name of minor*] permission to use the vehicle.**

SOURCES AND AUTHORITY

- Vehicle Code section 17708 provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."

- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)

- "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881].)

- "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905 [151 Cal.Rptr. 456], internal citations omitted.)

Secondary Sources

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.42– 4.43, pp. 120–121
- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[1], pp. 20-136.1–20-138
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2001 supp.) at §§ 1025–1026, pp. 272–273

State Bar Committee Comments on Proposed Changes:

The changes are all intended to avoid the misleading or confusing use of pronouns in the instructions. Because these instructions deal primarily with vicarious responsibility for the negligent use of vehicles, more clarity in achieved by reducing the number of pronouns and replacing with names.

516
Liability of Cosigner of Minor's Application for Driver's License

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of minor*]'s negligence in operating the vehicle and that [*name of defendant*] is responsible for the harm because ~~[he/she]~~ [*name of defendant*] signed [*name of minor*]'s application for a driver's license. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of minor*] was negligent in operating the vehicle;**

2. **That [*name of plaintiff*] was harmed;**

3. **That [*name of minor*]'s negligence was a substantial factor in causing the harm;**

4. **That [*name of defendant*] signed [*name of minor*]'s application for a driver's license; and**

5. **That at the time of the collision [*name of minor*]'s driver's license had not been canceled or revoked by the Department of Motor Vehicles**

SOURCES AND AUTHORITY

- Vehicle Code section 17707 provides in part: "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization."

- Vehicle Code section 17710 provides: "The person signing a minor's application for a license is not liable under this chapter for a negligent or wrongful act or omission of the minor committed when the minor is acting as the agent or servant of any person."

- Vehicle Code section 17711 provides: "Any person who has signed and verified the application of a minor for a driver's license or any employer who has authorized the

issuance of a license to a minor and who desires to be relieved from the joint and several liability imposed by reason of having signed and verified such application, may file a verified application with the department requesting that the license of the minor be canceled. The department shall cancel the license, except as provided in subdivision (e) of Section 17712. Thereafter, the person shall be relieved from the liability imposed under this chapter by reason of having signed and verified the original application on account of any subsequent willful misconduct or negligent operation of a motor vehicle by the minor."

- "Cancellation accomplishes voluntarily what revocation [of minor's driver's license] accomplishes involuntarily. If termination is accomplished by the latter method, resort to the former becomes superfluous. Once revocation occurs, the driving privilege is at an end. Thereafter there is no reason and no necessity for a voluntary application to terminate that which has already been terminated involuntarily. Both means are equally effective to terminate the driving privilege and to terminate the signer's liability." (*Hamilton v. Dick* (1967) 254 Cal.App.2d 123, 125 [61 Cal.Rptr. 894].)

- "[T]he negligence of the minor son of the [parents] is imputed to them … by virtue of their having signed his application for an operator's license, which was not revoked or cancelled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended" and even though the parents specifically forbade the minor from operating the vehicle. (*Sleeper v. Woodmanse* (1936) 11 Cal.App.2d 595, 598 [54 P.2d 519].)

- "It seems quite evident that, in adopting [the predecessors to sections 17150 and 17707] of the Vehicle Code, the legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. … We must assume the legislature intended to fix a limited liability … for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license." (*Rogers v. Foppiano* (1937) 23 Cal.App.2d 87, 92–93 [72 P.2d 239].)

Secondary Sources

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.41, 4.43, pp. 119–121
- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[2], pp. 20-139–20-143
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2001 supp.) at §§ 1025–1026, pp. 272–273

State Bar Committee Comments on Proposed Changes:

The changes are all intended to avoid the misleading or confusing use of pronouns in the instructions. Because these instructions deal primarily with vicarious responsibility for the negligent use of vehicles, more clarity in achieved by reducing the number of pronouns and replacing with names.

517
Negligent Entrustment of Motor Vehicle

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] negligently permitted [***name of driver***] to use ~~[his/her]~~ [*name of defendant*]'s vehicle. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of driver***] was negligent in operating the vehicle;**

2. **That [***name of defendant***] was an owner of the vehicle operated by [***name of driver***];**

3. That [***name of defendant***] ~~knew, or~~ should have known, that [***name of driver***] was incompetent or unfit to drive [*insert type of vehicle*] based on facts that [*name of defendant*] knew;

4. **That [***name of defendant***] permitted [***name of driver***] to use the vehicle;**

5. That [***name of defendant***] was negligent in permitting [***name of driver***] to drive [*insert type of vehicle*]; and

6. That [***name of driver***]'s incompetence or unfitness to drive was a substantial factor in causing [***name of plaintiff***]'s harm.

DIRECTIONS FOR USE

For a definition of "negligence" see instruction 301, *Basic Standard of Care.*

SOURCES AND AUTHORITY

- Vehicle Code section 14606(a) provides: "No person shall employ or hire any person to drive a motor vehicle nor shall he knowingly permit or authorize the driving of a motor vehicle, owned by him or her or under his or her control, upon the highways by any person unless the person is then licensed for the appropriate class of vehicle to be driven."

- Vehicle Code section 14607 provides: "No person shall cause or knowingly permit his child, ward, or employee under the age of 18 years to drive a motor vehicle upon the highways unless such child, ward, or employee is then licensed under this code."

- Vehicle Code section 14608(a) provides in part: "No person shall rent a motor vehicle to another unless: [¶] … [t]he person to whom the vehicle is rented is licensed under this code or is a nonresident who is licensed under the laws of the state or country of his or her residence."

- "A rental car company may be held liable for negligently entrusting one of its cars to a customer. … In determining whether defendant was negligent in entrusting its car to [the driver], defendant's conduct is to be measured by what an ordinarily prudent person would do in similar circumstances." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613], internal citations omitted.)

- Vehicle Code section 14606(a) and its predecessors "make a motor vehicle owner who knowingly entrusts his vehicle to an unlicensed driver liable for a third party's injuries caused by the driver's negligence. … The cause of action parallels that at common law for negligent entrustment, resting on a demonstration of knowing entrustment to an incompetent or dangerous driver with actual or constructive knowledge of his incompetence." (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 338 [244 Cal.Rptr. 789], internal citations omitted.)

- "Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270], internal citations omitted.)

- " 'It is generally recognized that one who places or entrusts his motor vehicle in the hands of one whom he knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness … .' [¶] … Under the theory of 'negligent entrustment,' liability is imposed on vehicle owner or permitter because of his own independent negligence and not the negligence of the driver, in the event plaintiff can prove that the injury or death resulting therefrom was proximately caused by the driver's incompetency." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 539 [55 Cal.Rptr. 741], internal citations omitted.)

- "[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and … this rule applies even where the third person's conduct is made possible only because the

defendant has relinquished control of his property to the third person, unless the defendant has reason to believe that the third person is incompetent to manage it." (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306].)

- "In its simplest form the question is whether the owner when he permits an incompetent or reckless person, who he knows to be incompetent or reckless, to take and operate his car, acts as an ordinarily prudent person would be expected to act under the circumstances. … [C]onsideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality." (*Rocca v. Steinmetz* (1923) 61 Cal.App. 102, 109 [214 P. 257].)

- "[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver's incompetence — not merely his lack of a license. … For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Dodge Center, supra,* 199 Cal.App.3d at p. 341, internal citations omitted.)

- "Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor 'upon inquiry as to the competency of' the unlicensed driver. … It is then for the jury to determine under the circumstances whether the entrustor is negligent in permitting the unlicensed driver to operate the vehicle." (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267–268 [14 Cal.Rptr. 889], internal citations omitted.)

- "[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff's incompetence when entrusting the vehicle." (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703].)

- "[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se." (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287].)

- "One who supplies an automobile for the use of another whom the supplier (1) knows, or (2) from facts known to him should know, to be likely, because of his inexperience (or incompetency), to use it in a manner involving unreasonable risk of bodily harm to others whom the supplier should expect to be in the vicinity of its use is subject to liability for bodily harm caused thereby to them." (*Johnson v. Casetta* (1961) 197 Cal.App.2d 272, 274 [17 Cal.Rptr. 81], internal quotation marks omitted.)

- "It is well-settled that where a company knows that an employee has no operator's license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is

for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle." (*Syah, supra,* 247 Cal.App.2d at p. 545.)

- "[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23], internal citations omitted.)

- "[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where … plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver's incompetence, the basis for a cause of action for negligent entrustment has been stated." (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697].)

Secondary Sources

- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25:47, pp. 71–73
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, § 4.38, pp. 116.1–117 (rel. 4/97)
- 2 Levy et al., California Torts (1986) Motor Vehicles, § 20.21, pp. 20-132–20-136 (rel. 1-8/86)
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 998–1000, pp. 389–391; *id.* (2001 supp.) at §§ 999–999C, pp. 256–259

State Bar Committee Comments on Proposed Changes:

Instruction 517 suffers from the same problem that the prior instructions did relating to the potentially confusing use of pronouns. Changes to remedy the problem are reflected below.

Further, the instruction does not include any mention of the type of vehicle entrusted to the operator. Because negligent entrustment cases can arise in a variety of contexts and the type of vehicle is important to the determination of liability in may of those contexts, it is recommended that the additions identified below be included.

Finally, the third element of the instruction speaks in terms of what a defendant "knew or should have known." "Should have known" is ambiguous in this context. The standard however requires notice, i.e., knowledge of facts that are sufficient to cause the defendant to believe or put defendant on notice that the driver is incompetent or unfit. See Dodge Center v. Superior Court, 199 Cal.App.3d, 332, 338 (1988); Grafton v. Mollica, 231 Cal.App.2d 860, 863 (1965); Johnson v. Casetta, 197 Cal.App.2d 272, 274 (1961). A defendant is not under an independent duty to investigate unless such facts are available or know to him or her. The instructions should be changed to reflect more specifically this legal requirement.

612
Constructive Notice of Store Owner Regarding Dangerous Conditions

In determining whether [*name of defendant*] knew or should have known of the condition that created the risk of harm you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough so that it would have been discovered and corrected by an owner using reasonable care.

The fact that the condition was apparent, or that injury from it was foreseeable, may itself show that a storeowner using reasonable care would have discovered it.

If an inspection ~~had~~ was not ~~been~~ made within a particular ~~period of~~ time before ~~an~~ the accident, this may ~~itself~~ show that the condition existed long enough so that a storeowner using reasonable care would have discovered it.

DIRECTIONS FOR USE

This instruction is intended for use where there is an issue concerning the presence or absence of a store owner's actual knowledge of a dangerous condition.

SOURCES AND AUTHORITY

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1205 [114 Cal.Rptr.2d 470], internal citation omitted.)

- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that … 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra,* 26 Cal.4th at p. 1210 internal citation omitted.)

- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate

with the risks involved." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra,* 26 Cal.4th at p. 1211, internal citations omitted.)

- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra,* at pp. 1212–1213, internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Line 3: This highlights the fact that the reasonableness of the length of time to discover the condition depends in part on the nature of the condition, such as how concealed it was, or how well trafficked the area was. The duty of care owed by a store owner is "ordinary care," which requires "making reasonable inspections of the portions of the premises open to

customers, and the care[required] is commensurate with the risks involved." Ortega at 1205. Ortega demands that the plaintiff show that "the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." Ortega at 1206. Ortega ties the time period to the nature of the condition, quoting favorably from a Court of Appeal decision stating that the "exact time the condition must exist" to satisfy the constructive notice requirement "cannot be fixed, because, obviously, it varies according to the circumstances." Ortega at 1210 (quoting Louie v. Hagstrom's Food Stores (1947) 81 Cal.App.2d 601, 608. Ortega also implicitly requires looking to the nature of the condition in observing that "[e]ach accident must be viewed in light of its own unique circumstances." Ortega at 1207. See also Barr v. Scott, (1955) 134 Cal.App.2d 823, 827 (approving instruction that "duty owed by an owner of property to an invitee is to exercise reasonable care…; and that in the absence of appearances that would …caution a reasonable person in like position[] to the contrary, an invitee has a right to assume that the premises are reasonably safe and to act on that assumption").

Surrounding instructions seem to warrant this change, since they address issues other than constructive notice. Instructions 600 (Issues in the case), 601 (Basic Duty of Care), (Obviously Unsafe Conditions) all address other issues.

Lines 7-9: This added instruction, in concert with the preceding suggested addition, maintains the jury's focus on reasonableness generally rather than the time element of reasonableness in particular. The first and third Ortega quotes in the Sources and Authority section support this proposal.

*Lines 11-12: This is shorter and clearer. *Note: This paragraph is taken directly from Ortega at 1210, favorably quoting Bridgman to reach the central holding of the Ortega case.*

850
Introduction to Contract Damages

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*] for breach of contract, you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm caused by the breach. This compensation is called "damages." The purpose of such damages is to put [*name of plaintiff*] in as good a position as [he/she/it] would have been if [*name of defendant*] had performed as promised.

To recover damages for any harm, [*name of plaintiff*] must prove:

1. **That the harm was likely to arise in the ordinary course of events from the breach of the contract; or**

2. **That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach.**

[*Name of plaintiff*] also must prove the amount of [his/her/its] damages. [Name of plaintiff] must provide enough evidence of that amount so that you can reasonably estimate it, without speculating or guessing. However, [name of plaintiff] does not have to prove the exact amount of damages. ~~to a reasonable certainty. However, [he/she/it] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.~~

[*Name of plaintiff*] claims damages for [*identify general damages claimed*].

DIRECTIONS FOR USE

This instruction should be always be read before any of the following specific damages instructions.

SOURCES AND AUTHORITY

- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

- Civil Code section 3282 provides: "Detriment is a loss or harm suffered in person or property."

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Civil Code section 3358 provides: "Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

- Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- Restatement Second of Contracts, section 351 provides:

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
    (a) in the ordinary course of events, or
    (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

- "The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)

- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)

- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "California case law has long held the correct measure of damages to be as follows: 'Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract.' " (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17], internal citations omitted.)

- " 'It is often said that damages must be "foreseeable" to be recoverable for breach of contract. The seminal case announcing this doctrine, still generally accepted as a limitation on damages recoverable for breach of contract, is *Hadley v. Baxendale.* First, general damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. Second, if special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)

- "It is well settled that the party claiming the damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty." (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880–881 [87 Cal.Rptr. 740], internal citation omitted.)

- "Whether the theory of recovery is breach of contract or tort, damages are limited to those proximately caused by their wrong." (*State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.* (1970) 9 Cal.App.3d 508, 528 [88 Cal.Rptr. 246], internal citation omitted.)

- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)

- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)

- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 815 et seq.
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

State Bar Committee Comments on Proposed Changes:

Line 3-4: This keeps the jury focused on the issue of causation.

Lines 17-20: First, this suggested language is more positive rather negative, providing the jurors clearer guidance about what they should be doing (rather than solely what they should not do). See, e.g., Strunk & White, Elements of Style (New York: bartleby.com, 1999), Section III, Rule 12 ("Make definite assertions. . . . Consciously or unconsciously, the reader is dissatisfied with being told only what is not; he wishes to be told what is. Hence, as a rule, it is better to express a negative in positive form").

Second, the suggested language fills the gap between "exact" and "speculate" "guess" by use of the term "estimate"

Third, the suggested language avoids the back-and-forth nature of the current language. The paragraph as it stands risks creating confusion through its back-and-forth phrasing: first, burden on plaintiff to prove damages; second, easing of burden by refusing to require exactitude; third, reassertion of burden by prohibiting guesswork. The suggested language avoids this problem by grouping the "burdening" concepts together, and then describing the easing of the burden.

Fourth, elimination of the term "harm" (end of line 7) clarifies that the jury's focus should be on quantifying damages, which are a dollar value, as opposed to harm, which is an injury (and therefore not susceptible of reduction to an "amount").

Support: Although the case law tends to focus on the negative (e.g., "do not speculate") rather than the positive (e.g., "estimate"), presumably in an abundance of caution, there is support for the common sense notion that juries should be instructed to estimate damages (since inevitably they do so regardless and must in many cases to reach a figure). See Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal. App. 3d 532, 545 ("[T]he jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly'") (cited in Sources & Authority section for Instructions 3000 (p. 334), 3001 (p. 337), 3002 (p. 340), and 3007 (p. 354); Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 702 (quoting Schuler v. Bordelon (1947) 78 Cal. App. 2d 581, 586) ("In determining the amount of damages that should be assessed against appellant herein, the jury was entitled to estimate as best they could from the evidence before them. . . . Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing damages…") (emphasis added). See also Zinn v. Ex-Cell-O Corp. (1944) 24 Cal. 2d 290, 297 ("One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness.") (emphasis added). This concept of estimation applies likewise in contract actions. See, e.g., Postal Instant Press v. Sealy (1996) 43 Cal. App. 4th 1704, 1708-09 (noting that damages should include those "future profits [that] can be estimated with reasonable certainty"); Phalanx Air Freight v. National Skyway Freight Corp. (1951) 104 Cal. App. 2d 771, 776-77 (citing Schuler and Zinn). The concept of estimation also applies to awards of pain and suffering. See, e.g., Lemere v. Safeway Stores (1951) 102 Cal. App. 2d 712, 726-27 (approving instruction beginning "in order to enable you to estimate the amount of such damages as you may allow for pain and suffering. . .") (emphasis added). Furthermore, the proposed instructions employ the term "estimate." See Instruction 852 (lost profits), line 7; Instruction 853 (lost profits), lines 7 & 21.

Note (other instances): Identical text (or text sufficiently similar to justify making this change uniformly to those Instructions as well) appears in a dozen other places: Instructions 850 (p. 35, lines 16-19), 2116 (p. 105, lines 6-8), 1259 (p. 81, lines 10-13), 1260 (p. 84, lines 10-13), 1109 (p. 86, lines 6-9), 1112 (p. 95, lines 10-13), 1113 (p. 98, lines 10-13), 2115 (p. 101, lines 6-9), 2618 (p. 219, lines 10-13), 2819 (p. 288, lines 6-9), 2820 (p. 289, lines 11-15), and 3121 (p. 420, lines 9-12). We recommend making this change in all of those instances as well.

851
Special Damages

[*Name of plaintiff*] due to special circumstances [also] claims damages for [*identify special damages*].

To recover for this harm, [*name of plaintiff*] must prove that when the parties made the contract, [*name of defendant*] knew or reasonably should have known of the special circumstances leading to such harm.

DIRECTIONS FOR USE

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as "special."

SOURCES AND AUTHORITY

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- Restatement Second of Contracts, section 351 provides:

  (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
  (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  (a) in the ordinary course of events, or
  (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
  (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise

if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

- "Special damages must fall within the rule of *Hadley v. Baxendale*, … that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach. If special circumstances cause an unusual injury, special damages cannot be recovered unless the circumstances were known or should have been known to the party at fault at the time the contract was made." (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81], internal citations omitted.)

- "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury." (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164–165 [11 P. 882], internal citation omitted.)

- " 'The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.' " (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409, internal citation omitted.)

- "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special

damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "When the facts show that a special purpose is intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily flow from a breach by the other party), and this special circumstance is brought to the attention of the other party, damages normally flowing from a breach of the contract in view of such special circumstances are said to be within the contemplation of the parties." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334 [343 P.2d 341], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law, (9th ed. 1987) § 815

852
Loss of Profits—No Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned some profit~~s~~ but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must determine the gross, or total, amount [*name of plaintiff*] would ~~was reasonably certain to~~ have received if the contract had been performed, and then subtract from that amount the ~~[his/her/its] [estimated/actual]~~ costs [including the value of the [labor/materials/rents/all expenses/interest on loans invested in the business]] [name of plaintiff] would have had if the contract had been performed.

[Name of plaintiff] does ~~You do~~ not have to prove ~~calculate~~ the exact amount of the lost profits ~~with mathematical precision~~, but there must be a reasonable basis for computing the loss. [Name of plaintiff] must provide enough evidence of the [total / gross] amount of profits that would have been received, and of the costs that would have incurred, so that you can reasonably estimate the amount of lost profits, without speculating or guessing.

DIRECTIONS FOR USE

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages*, or Instruction 851, *Special Damages*.

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

SOURCES AND AUTHORITY

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."
- Restatement Second of Contracts, section 351(3) provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing

recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364], internal citation omitted.)

- " 'Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the evidence of loss of prospective profits meets that standard.' " Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,* 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is,

enough to place the nonbreaching party in the same position as if the breach had not occurred. This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708–1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

- "Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (1987 9th ed.) Contracts, §§ 823–827
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

State Bar Committee Comments on Proposed Changes:

A fundamental conceptual issue raised by Instruction 852, as well as Instruction 853, is whether a claimant must demonstrate the fact of damage according to the same standard – and with the same degree of certainty – as the amount of damage. As drafted by the Task Force, Instructions 852 and 853 require that both the fact, and the amount, of lost profits be proved to a "reasonable certainty". In applying the same standard to these two distinct inquiries, the instructions, as drafted, affirmatively suggest that the same level of certainty is required for both.

The Committee recognizes that the language and holdings of California cases are not entirely consistent. However, there is virtually universal recognition – not only in the case law, but also in pertinent secondary authorities – that proof of the amount of lost profit damage is subject to a distinctly different, and lesser, requirement of certainty than is the fact of damage. A common formulation is that set forth in GHK Associates v. Mayer Group, Inc., 224 Cal.App.3d 856, 873-4 (1990). In GHK Associates the Court of Appeal stated that "the law requires only that some

reasonable basis of computation of damages be used…even if the result is an approximation."[1] *A similar standard was adopted in Noble v. Tweedy, 90 Cal.App.2d 738, 746 (1949), the Court of Appeal concluding that "[a]s long as there is available a satisfactory method for obtaining a reasonable proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." In Stott v. Johnston, 36 Cal.2d 864, 876 (1951) the California Supreme Court stated that "the law only requires that the best evidence be adduced of which the nature of the case is capable."*[2]

Insofar as Instructions 852 and 853 suggest that the same legal standard should be applied to the fact and amount of lost profit damage, the impression conveyed is inconsistent with the weight of legal authority which recognizes that lesser certainty is required when it comes to proving the amount of lost profit damage. The Committee is mindful that many cases state, often in passing or as something of a platitude, that both the 'occurrence' and the 'extent' of the injury must be shown with "reasonable certainty." See e.g. Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc., 78 Cal.App.4th 847, 849 (2000) ("Lost profits … may be recovered if their extent and occurrence can be ascertained with reasonable certainty."); Sanchez-Corea v. Bank of America, 38 Cal.3d 892, 907 (1985) ("in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.'") However, even in cases where such statements appear, the courts typically acknowledge and apply a different and more lenient standard for assessing proof of the amount.

The leading treatise on recovery of lost profit damages offers the following observation on the matter at hand:

> *It would be misleading to discuss the 'reasonable certainty' rule without stating its most important qualification. Those courts that have gone further than a simple statement that 'reasonable certainty' is required have almost invariably recognized that the rule applies only to the fact of damages, not to the amount of damages. Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If plaintiff's proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (perhaps none at all) is required in proof of the amount of damages. While the proof of the fact of the damages must be certain, proof of the amount may be an estimate uncertain or inexact. [Dunn, Recovery for Lost Profits (5th Ed. 1998) at Section 1.6. at 17.]*

The Committee believes that Instructions 852 and 853 should be revised to eliminate any suggestion that the same standard of certainty applies to the fact and the amount of lost profit damage. Elimination of "reasonable certainty" as the yardstick for assessing proof of the amount will reduce the potential for juror confusion. The Committee notes that this is the approach currently taken in California Forms of Jury Instructions (Matthew Bender 2002). (Instruction 6.08) ("If it is reasonably certain that [he/she/it] has suffered [or will suffer] a particular loss or type of harm as a result of a breach by Defendant, Plaintiff is entitled to recover damages for that loss or harm as long as there is some reasonable basis for estimating or approximating the amount of the loss or harm. [He/She/It] may not be denied damages

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[1] The Task Force's proposed instruction includes reference to the *GHK Associates* standard.

[2] A sampling of case law and secondary authorities acknowledging a different, and lesser, standard for proof of the amount of lost profit damage is set forth as an Appendix. The Task Force may wish to consider adding certain of these authorities to the Sources and Authorities published with Instructions 852 and 853.

merely because the amount of the loss or harm is uncertain or difficult to determine.") (See also at 6-24 et.seq.)

In the event that the Task Force is inclined to retain "reasonable certainty" as the controlling standard for proof of the amount of lost profit damage, the Committee recommends that the instruction be revised to make clear that the requirement that there be reasonable certainty is satisfied if the plaintiff meets the more relaxed standard that the courts have applied in practice – namely, that there be a reasonable basis for computing the loss.

The Committee retains as a predicate to recovery of lost profit damages that there be a "reasonable basis for computing the loss" and that "sufficient evidence" be presented to allow the jury to "reasonably estimate the amount of lost profits without speculating or guessing". The Committee believes that this combination of requirements renders the instructions consistent with California law, and less subject to confusion or misapplication.

Finally, the Committee notes that Instruction 852 is essentially identical to Instruction 2004N (Lost Profits / Economic Damage) from the Third Release. Accordingly, the Committee recommends that Instruction 2004N be modified in a manner consistent with that proposed here for Instruction 852.

APPENDIX

ADDITIONAL SOURCES AND AUTHORITY:

I. CASE LAW

A. The following sources and authorities were cited by the Task Force in support of Instruction 2004N ["Lost Profits (Economic Damage")]

"If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." ("Aronowicz v. Nalley's, Inc. (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424], internal citations omitted.)

"Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense"…or, … "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability."'" (Maggio, Inc. v. United Farm Workers (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250], internal citations omitted.)

"It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (S.C. Anderson, Inc. v. Bank of America (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

B. New Sources and Authorities:

"As long as there is available a satisfactory method for obtaining a reasonable proximate

estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." Noble v. Tweedy, 90 Cal.App.2d 738, 746 (1949)

"[I]t appears to be the general rule [in lost profit damage cases] that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment…While plaintiff did not introduce any evidence as to loss of specific customers by reason of his use of defendants' defective paint in his business, it is readily arguable that such items of proof may not have been available to plaintiff by reason of the particular nature of his mode of operations…Under all the circumstances here, it is difficult to see what additional evidence plaintiff could have introduced on the damage issue. The law only requires that the best evidence be adduced of which the nature of the case is capable." Stott v. Johnston, 36 Cal.2d 864, 875-6 (1951) (claim by house painter against manufacturer of defective house paint for loss of good will; analysis analogous to lost profits).

"It is well-established under California law that while the fact of damages must be clearly shown, the amount need not be proved with the same degree of certainty, so long as the court makes a reasonable approximation." Robi v. Five Platters, Inc., 918 F.2d 1439, 1443 (9th Cir. 1990).

"In reviewing a damage award of lost business profits, the appellate court must couple the substantial evidence concept with recognition that evidentiary imponderables are unavoidable…The law will allow reasonably calculated damages even if the result is only an approximation; the wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute." Guntert v. City of Stockton, 55 Cal.App.3d 131, 143 (1976).

"[W]here the fact of damage has been established the precise amount of the damages need not be calculated with absolute certainty. 'As long as there is available a satisfactory method for obtaining a reasonable proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision.' Noble v. Tweedy, 90 Cal.App.2d 738, 746 (1949)" Dubarry International, Inc. v. Forest Industries, 231 Cal.App.3d 552, 562 (1991).

C. Additional excerpt from authority cited by Task Force in support of Instructions 852 and 853.

California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal.App.3d 1, 63 (1985)

"As the Supreme Court observed in Continental Car-Na-Var Corp. v. Mosely, 24 Cal.2d 104, 113 (1944): 'Evidence to establish [lost] profits must not be uncertain or speculative. This rule does not apply to uncertainty as to the amount of the profits which would have been derived, but to uncertainty or speculation as to whether the loss of profits was the result of the [breach] and whether any such profits would have been derived at all."

II. SECONDARY AUTHORITIES

"It would be misleading to discuss the 'reasonable certainty' rule without stating its most important qualification. Those courts that have gone further than a simple statement that 'reasonable certainty' is required have almost invariably recognized that the rule applies only to

the fact of damages, not to the amount of damages. Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If plaintiff's proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (perhaps none at all) is required in proof of the amount of damages. While the proof of the fact of the damages must be certain, proof of the amount may be an estimate uncertain or inexact." Dunn, Recovery for Lost Profits (5th Ed. 1998) § 1.6 at 17.

"Although certainty in the fact of damages is required, less certainty (or none at all) is required to prove the amount of damages." Dunn, Recovery for Lost Profits (5th Ed. 1998) § 5.1 at 382.

"There are many cases in which, by reason of the ordinary experience and belief of mankind, the trial court is convinced that substantial pecuniary harm has been inflicted, even though its amount in dollars is incapable of proof. If the defendant had reason to foresee this kind of harm and the difficulty of proving its amount, the injured party will not be denied a remedy in damages because of the lack of certainty. It seems probable also that a lesser degree of certainty will be required as against one whose breach is described is 'willful' or is motivated by malice or avarice than against one whose breach was due to misfortune and whose efforts to perform were honest and in good faith. In such cases the trial court and jury have a greater degree of discretion and doubts will more readily be resolved against the party committing the breach." Corbin on Contracts Volume 11 (Interim Edition) § 1020, p. 108-109.

"The law requires that this evidence [of lost profits] shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone. The amount of evidence required and the degree of its strength as a basis of inference varies with circumstances. A greater amount and a higher degree are required in those cases in which it is usually possible to produce it than in cases where it is usually impossible or difficult and the defendant had reason to know it."
Corbin on Contracts Id. at § 1022, p. 120-121.

"It is not possible to state the precise degree of approach to certainty required for the recovery of profits as damages for breach of contract. If the mind of the court is certain that profits would have been made if there had been no breach by the defendant, there will be a greater degree of liberality in allowing the jury to bring in a verdict for the plaintiff, even thought the amount of profits prevented is scarcely subject to proof at all. In this respect, at least, doubts will generally be resolved in favor of the party who has certainly been injured and against the party committing the breach. The trial court has a large amount of discretion in determining whether to submit the question of profits to the jury; and when it is so submitted, the jury will also have a large amount of discretion in determining the amount of its verdict."
Corbin on Contracts Id. at § 1022, p. 123-126.

"Where the fact is well established that profits would have been made and the difficulty in proving their amount is directly caused by the defendant's breach, a greater liberality is permitted in making estimates and drawing inferences."
Corbin on Contracts Id. at § 1023, p. 133-134.

California Forms of Jury Instructions (Matthew Bender 2002) at 6-42:

"[T]he requirement that the plaintiff establish the elements of the damages claimed with 'reasonable certainty' is limited to a showing of the existence and cause of the damages. Once the plaintiff proves the existence and cause of damages, recovery will not be

denied because the amount of damages is uncertain, contingent, or difficult to determine. All that is required is that there be some reasonable basis for estimating or approximating the amount." (At 6-42)

Roach, Correcting Uncertain Prophecies: "An Analysis of Business Consequential, Damages", 22 Rev. of Litigation, Winter 2003 1, 40:

"All courts agree that the proof of damage in fact must be more certain than the amount of damages, but few courts specify exact threshold levels for probability or certainty." (referring to the "widespread leniency of the evidence required for the amount of damage.")

Uniform Commercial Code, § 1-106, Comment (1)

853
Loss of Profits—Some Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned some additional profit~~s~~ but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must:

1. **First, ~~C~~calculate [*name of plaintiff*]'s estimated total profit by determining the gross amount~~, or total, amount~~ [*name of plaintiff*] would ~~was reasonably certain to~~ have received if the contract had been performed, and then subtracting from that amount the costs ~~the expenses~~ [including the value of the [labor/materials/rents/all expenses/interest on loans invested in the business]] [*name of plaintiff*] ~~was reasonably certain to~~ would have had if the contract had been performed;**

2. **Next, ~~C~~calculate [*name of plaintiff*]'s actual profit by determining the gross amount [*name of plaintiff*] actually received, and then subtracting from that amount [*name of plaintiff*]'s actual costs ~~expenses~~ [including the value of the [labor/materials/rents/ all expenses/interest on loans invested in the business]]; and**

3. **Then, ~~S~~subtract [*name of plaintiff*]'s actual profit, which you determined in the second step, from [*name of plaintiff*]'s estimated total profit which you determined in the first step. The resulting amount is [*name of plaintiff*]'s lost profit.**

[Name of plaintiff] ~~You do~~ does not have to prove the exact ~~calculate the~~ amount of the lost profits, but there must be a reasonable basis for computing the loss. [Name of plaintiff] must provide enough evidence of the gross amount of profits that would have been received, and of the costs that would have been incurred, as well as of the actual amount received and the actual costs incurred, so that you can reasonably estimate the amount of lost profits without speculating or guessing. ~~with mathematical precision, but there must be a reasonable basis for computing the loss.~~

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages*, or Instruction 851, *Special Damages.*

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

SOURCES AND AUTHORITY

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Restatement Second of Contracts, section 351(3) provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364], internal citation omitted.)

- " 'Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the

evidence of loss of prospective profits meets that standard.' " Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,* 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred. This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708–1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

- "Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 823–827
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

State Bar Committee Comments on Proposed Changes:

1. *In addition to the changes made to Instruction 852 (Loss of Profits – No Profits Earned) a few additional changes might help the jury understand, and correctly perform, the mental gymnastics of first determining total projected profits, then determining actual profits, followed by the mathematical function of simply subtracting the latter from the former. Specifically:*
    a. *Added the word "additional" in the first paragraph (to both versions of 853) to help the jury understand the focus here is on the delta attributable to the defendant's conduct.*
    b. *Introduced the three subparagraphs with "First,", "Next", and "Then"; and in the last subparagraph added reference to the first and second steps, to help the jury stay on track. I may not be giving the jury enough credit, and these changes may not be necessary.*
    c. *Added the qualifying terms "total" and "actual"/"actually" to subparagraphs 1 & 2, to distinguish what's going on in the first and second steps. Because the word "total" is used in subparagraph 1 to describe all projected profits, only the word "gross" (rather than [gross/total] as in 852) is used to describe revenues before subtraction of costs.*
    d. *Consistent with the approach taken in 852, the last paragraph of Instruction 853 states precisely what plaintiff must provide "enough evidence" of – namely, "the [total/gross] amount of profits that would have been received, and the costs that would have been incurred, as well as the actual amount received and the actual costs incurred." Because the jury is dealing with revenue and costs for both the "total" [i.e. projected] and "actual" scenarios, specifying what there must be "sufficient evidence" of gets more complicated than it is in 852. An alternative would be to substitute for the second sentence of the last paragraph the following: "However, [name of plaintiff] must provide enough evidence of the amount so that you can reasonably estimate it without speculating or guessing."*

II. SECONDARY AUTHORITIES

"It would be misleading to discuss the 'reasonable certainty' rule without stating its most important qualification. Those courts that have gone further than a simple statement that 'reasonable certainty' is required have almost invariably recognized that the rule applies only to the fact of damages, not to the amount of damages. Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If plaintiff's proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (perhaps none at all) is required in proof of the amount of damages. While the proof of the fact of the damages must be certain, proof of the amount may be an estimate uncertain or inexact."
Dunn, Recovery for Lost Profits (5th Ed. 1998) § 1.6 at 17.

"Although certainty in the fact of damages is required, less certainty (or none at all) is required to prove the amount of damages."
Dunn, Recovery for Lost Profits (5th Ed. 1998) § 5.1 at 382.

"There are many cases in which, by reason of the ordinary experience and belief of mankind, the trial court is convinced that substantial pecuniary harm has been inflicted, even though its amount in dollars is incapable of proof. If the defendant had reason to foresee this kind of harm and the difficulty of proving its amount, the injured party will not be denied a remedy in damages

because of the lack of certainty. It seems probable also that a lesser degree of certainty will be required as against one whose breach is described is 'willful' or is motivated by malice or avarice than against one whose breach was due to misfortune and whose efforts to perform were honest and in good faith. In such cases the trial court and jury have a greater degree of discretion and doubts will more readily be resolved against the party committing the breach." Corbin on Contracts Volume 11 (Interim Edition) § 1020, p. 108-109.

854
~~Owner's/Lessor's~~ Damages for Breach of Contract to Construct Improvements on Real Property Owned by Plaintiff

To recover damages for breach of a contract to construct improvements on real property owned by [*name of plaintiff*], [name of plaintiff] must prove:

[[The reasonable cost to [*name of plaintiff*] of completing or repairing the work;]

[And the value of loss of use of the property;]

[And the reasonable cost of alternative housing from the date the work was to have been completed until the date the work was completed;]

[Less any amounts unpaid under the contract with [*name of defendant*];]]

~~*[or]*~~

~~**[The difference between the fair market value of the property and its fair market value had the improvements been constructed.]**~~

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages.* The first bracketed alternative is for use in cases where the plaintiff owns the land. The second is for cases in which the plaintiff does not own the land. For a definition of "fair market value" see Instruction 1901, *"Fair Market Value" Explained*.

SOURCES AND AUTHORITY

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and

3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co., Inc.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802], internal citations omitted.)

- "If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600 [262 P.2d 305], internal citations omitted.)

- "It is settled … that the measure of damages for the breach of a building construction contract is ordinarily such sum as is required to make the building conform to the contract. In such situations, the diminution of value rule cannot be invoked and the measure of damages is not the difference between the actual value of the property and its value had it been constructed in accordance with the plans and specifications." (*Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 124 [30 Cal.Rptr. 714], internal citations omitted.)

- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "Where the measure of damages turns on the value of property, whether liability sounds in tort or breach of contract, the normal standard is market value. The definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property. [¶] In *Sacramento etc. R. R. Co. v. Heilbron*, market value was defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' That classic exposition with subsequent refinements has always been the accepted definition of market value in California." (*Glendale Federal Savings & Loan Assn., supra,* 66 Cal.App.3d 101, 141–142, internal citations and footnote omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 854

State Bar Committee Comments on Proposed Changes:

Line 4: This will help to ensure the jury understands that even when an improvement has been "completed", but in a defective manner, they can award the cost of repairing the improvement to the condition bargained for in the contract. (See Erlich v. Menezes (1999) 21 Cal.4th 543, 561 [holding cost of repair recoverable as damages for defectively completed project]; 1 Witkin, Summary of California Law (9th ed. 1987), §854 [damages may include "cost of reconstruction or completion"].)

Lines 16-17: The alternate instruction on lines 16-17, which according to the Directions for Use applies in circumstances where plaintiff "does not own the land", has a couple of problems. First, on line 16, the phrase "the property" is ambiguous. In many cases, a jury could not determine whether "the property" means (1) the property on which the improvements are to be constructed; or (2) plaintiff's property. In fact, California courts have applied the standard with both meanings.

For example: In Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co., Inc. (1977) 66 Cal.App.3d 101, the court applied the standard from lines 16-17 with the "the property" meaning the property on which the improvements were to be constructed. (Id. at 13-125.) Plaintiff lender held a security interest in the property. Defendants failed to construct agreed-upon improvements on that property. The court held that the measure of damages was the value the improvements would have added to the security – i.e., the difference between the value of the property with and without the completed improvements.

On the other hand, in Coughlin v. Blair (1953) 41 Cal.2d 587, the Court applied the same standard, but "the property" meant plaintiff's property, which adjoined the property on which the improvements were to be constructed. (Id. at 600-601.) Plaintiff bought a lot from defendant, and defendant agreed to construct pavement, gas and electric lines on the adjoining property leading up to plaintiff's lot. After defendant failed to perform, the Court upheld an award f damages based, in part, on the difference in value of plaintiff's lot with and without the improvements constructed on the neighboring property. (See also Rakish v. Valerga (1954) 125 Cal.App.2d 274 [following Coughlin under similar facts].)

Second, with respect to adjoining property cases (such as Coughlin and Rakish), the plaintiff may also recover, in addition to the measure on lines 15-16, (1) the value of loss of use of his property (limited in time from the date of breach to the time plaintiff sues or treats defendant's breach as total); and (2) other special damages (with the same time limit) – in Coughlin, this included "increased building costs" for plaintiff's own improvement projects. (Coughlin at 603-604.)

854.1 [NEW]
Damages for Breach of Contract to Construct Improvements on Real Property Not Owned by Plaintiff

To recover damages for breach of a contract to construct improvements on real property not owned by [name of plaintiff], [name of plaintiff] must prove:

[The difference between the fair market value, with and without the improvements, of the property on which the improvements were to be constructed;]

[or]

[The difference between the fair market value of the property owned by [name of plaintiff], and its fair market value had the improvements been constructed;]

[And the value of loss of use of [name of plaintiff]'s property;]

[And [insert item(s) of claimed special damages].]

DIRECTIONS FOR USE

See State Bar Committee Comments .

State Bar Committee Comments on Proposed Changes:

The Directions for Use should specify that the first alternative in Instruction 854.1 should be used in situations where plaintiff holds a security (or similar) interest in the property on which the improvements were to be constructed. (This would cover cases like Glendale Federal Savings and similar cases involving a lender or mortgagee's security interest.) The Directions should specify that the second alternative should be used in situations to be constructed on neighboring property. (This would cover Coughlin type cases.) With the latter alternative, the Directions should also specify that any damages for loss of use or other special damages must be limited in time from the date of breach to the date plaintiff files its complaint or otherwise treats defendant's breach as total.

859
Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff*] must prove that such harm is reasonably certain to occur and must prove the amount of those future damages.

~~**The amount of damages for future harm must be reduced to present cash value.**~~

If you determine that [name of plaintiff] is entitled to damages for further harm, you must than determine what amount of cash, if reasonably invested today will compensate [him/her/it] for those future damages. This is referred to as the present cash value of future damages and is base don the assumption that cash in hand today, if reasonably invested, will generate additional cash in the future. [In this case, the parties have stipulated that the appropriate discount rate for determining present cash value is . You will use that rate if you find that plaintiff is entitled to damages for future harm.]

[In this case, the parties have introduced evidence as to what they believe is the appropriate discount rate to be used. You are not bound to accept either party's position, and are free to determine from all the evidence including that of expert witnesses, what you believe is the appropriate discount rate for determining present case value if you find that plaintiff is entitled to damages for future harm.]

[You will be provided with a table to help you calculate the present cash value based upon what you determine to be the appropriate discount rate to be applied to the damages fro future harm.]

~~**This is necessary because money received now will, through investment, grow to a larger amount in the future.**~~

~~**To find present cash value, you must determine the amount of money which, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.**~~

[You may consider expert testimony in determining the present cash value of future damages.]

[You will be provided with a table to help you calculate the present cash value.]

DIRECTIONS FOR USE

Present cash value tables have limited application. In order to use the tables, the discount rate to be used must be established by stipulation or by the evidence. Care must be taken that the table selected fits the circumstances of the case. Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful in many cases.

Give the second bracketed option if parties have stipulated to a discount rate or evidence has been presented from which the jury can determine an appropriate discount rate. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)

SOURCES AND AUTHORITY

- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin, supra*, 41 Cal.2d at pp. 598–599, internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Lines 26-32: These lines should be eliminated. It states as a fact something that is not necessarily true. If the jury is going to be instructed that it must determine the amount of present value, and that the amount they arrive at as present value has to be something less

than the amount of future damages, at most it should be told that this reduction is based upon an assumption, which the jury must accept, that if invested it will grow in value.

Lines 5-24: Suggested alternative to lines 26-32.

860
Nominal Damages

If you decide that [*name of defendant*] breached the contract but also that [*name of plaintiff*] was not harmed by the breach, you may ~~must~~ still award [*name of plaintiff*] nominal damages such as one dollar.

SOURCES AND AUTHORITY

- Civil Code section 3360 provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

- "A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California." (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632–633 [337 P.2d 499], internal citations omitted.)

- "With one exception … an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar." (*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 822

State Bar Committee Comments on Proposed Changes:

The Committee recommends that "must" be replaced with "may". A jury is not required to award nominal damages if the plaintiff was not harmed by the breach.

1012
Loss of Design Immunity (*Cornette*)

[*Name of defendant*] is not responsible for harm caused to [*name of plaintiff*] based on the plan or design of the [*insert type of property, e.g., "highway"*] unless [*name of plaintiff*] proves [each of] the following:

1. **That the [*insert type of property, e.g., "highway"*]'s ~~original~~ plan[s] or design[s] had become dangerous because of a change in physical conditions; and**

2. **That [*name of defendant*] ~~knew or should have known~~ had notice of the dangerous condition created because of the change in physical conditions; and**

3. **[That [*name of defendant*] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;] [or]**

   [That [*name of defendant*], unable to correct the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings of the dangerous condition.

DIRECTIONS FOR USE

The judge should make the initial determination establishing design immunity. Two of the elements involved in that determination could potentially become jury issues, but, as a practical matter, these elements are unusually stipulated to or otherwise established.

The judge should include instructions 1002 and 1003 to define "notice" and "dangerous condition" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" has been the subject of numerous decisions applying it to specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

SOURCES AND AUTHORITY

- Government Code section 830.6 provides, in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design

of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

- "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1], internal citations omitted.)

- "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette, supra,* 26 Cal.4th at p. 66, internal citations omitted.)

- "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette, supra,* 26 Cal.4th at p. 69, internal citation omitted.)

- "The third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, must be tried by the court, not the jury. Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to

a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66–67.)

State Bar Committee Comments on Proposed Changes:

The committee believed that the loss of design immunity instruction required revision in a number of respects. First, the instruction should be clear that all three elements are required. Second, the instruction should be changed to reflect the fact that not just the "original" plan but all plans at issue should be considered. Third, the statement "knew or should have known" does not capture the statutorily defined requirements. Because those factors have already been described separately in proposed instruction number 1003, use of the word notice in conjunction with the giving of instruction 1003 is a better approach. Similarly, the instruction should be used in connection with instruction number 1002, which defines what a "dangerous condition" is in this context. Fourth, the final element should be modified to make clear that the government entity, which does not have funds to correct the problem, must warn of the dangerous condition of which they have notice not warning in the abstract. Finally, the meaning, of "change in physical conditions" has been the subject of substantial, and not always consistent, debate in various cases. See Government Tort Liability in California §12.74A (CEB 4th Ed. June 2002 update). Courtst should be alerted to this issue in the use notes with a recommendation that they craft an appropriate additional instruction where it is needed. The changes reflect these points.

1254A
First Amendment Defense to Use or Appropriation of Name or Likeness (*Comedy III*)

[*Name of defendant*] claims that [he/she] has not violated [*name of plaintiff*]'s right of privacy because the [*insert type of work, e.g. "picture"*] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [*name of defendant*] must prove either of the following:

~~1.~~1. That the [*insert type of work, e.g. "picture"*] adds something new to [*name of plaintiff*]'s likeness, giving it a new expression, meaning, or message; or

2. That the marketability and economic value of the [*insert type of work, e.g. "picture"*] does not derive primarily from [*name of plaintiff*]'s fame.

SOURCES AND AUTHORITY

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126].)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the

creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection —it may still be a transformative work." (*Comedy III Productions, Inc., supra,* at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see … whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."' " (*Comedy III Productions, Inc., supra,* at p. 404, internal citations omitted.)

- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, form heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* at p. 406.)

State Bar Committee Comments on Proposed Changes:

The purpose of this instruction is to address the California Supreme Court's decision in Comedy II Productions Inc. v. Gary Saderup, Inc., (2001) Cal.4th 287, 407. In that decision, the Court defined the test as whether the new work was "transformative". In particular, the language used is not found within the California Supreme Court's decision. The Committee noted that the issue is again before the Supreme Court in Winter v. D.C. Comics. Accordingly, rather than draft a new instruction that may be moot, the Committee recommends that the Task Force wait for a decision from the Supreme Court before issuing an instruction. If not, the Task Force may find additional assistance from jury instructions regarding the term "transformative" from copyright law.

1259
Damages

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was caused by [*name of defendant*], even if the harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. [Name of plaintiff] must provide enough evidence of that amount so that you can reasonably estimate it without speculating or guessing. However, [*name of plaintiff*] does not have to prove the exact amount of damages. ~~the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.~~

~~The following are the specific items of damages claimed by~~ [N*name of plaintiff*] claims that he suffered the following types of harm and requests damages for each:

1. **[Mental suffering/anxiety/humiliation/emotional distress;]**

2. **[Harm to reputation and loss of standing in the community;]**

3. **[The commercial value of [*name of plaintiff*]'s name or likeness;]**

4. **[*Insert other applicable item of damage.*]**

No fixed standard exists for deciding the amount of damages for [*insert item of mental or emotional distress*]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of mental or emotional distress*], [*name of plaintiff*] must prove that [he/she] is reasonably certain to suffer that harm.]

DIRECTIONS FOR USE

This instruction is not intended for cases involving invasion of privacy by false light. Damages for false light are similar to the damages available in defamation. (See Instructions 1200 to 1205).

Item 2 will probably not be relevant in all cases. It will have particular application to the aspect of this tort involving the publication of private facts. (See *Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 137 [188 Cal.Rptr. 762].)

Item 3 is intended only for cases involving violation of privacy by appropriation.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 652H provides:

  One who has established a cause of action for invasion of his privacy is entitled to recover damages for
  (a) the harm to his interest in privacy resulting from the invasion;
  (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
  (c) special damage of which the invasion is a legal cause.

  Note that this Restatement section has not been cited by any published California cases.

- "Damages recoverable in California for invasion of a privacy right were discussed in detail in *Fairfield v. American Photocopy Equipment Co.* The Court of Appeal declared that because the interest involved privacy, the damages flowing from its invasion logically would include an award for mental suffering and anguish. *Fairfield* was an appropriation case, but the principles it laid down concerning damage awards in privacy cases relied on a body of California law which had already recognized violation of the right of privacy as a tort." (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1484 [232 Cal.Rptr. 668], internal citation omitted.)

- "The elements of emotional distress damages, i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc. would thus be subjects of legitimate inquiry by a jury in the action before us, taking into account all of the consequences and events which flowed from the actionable wrong." (*Miller, supra,* 187 Cal.App.3d at p. 1485.)

- "The actual injury involved herein is not limited to out-of-pocket loss. It generally includes 'impairment of reputation and standing in the community, personal

humiliation, and mental anguish and suffering.' " (*Diaz, supra,* 139 Cal.App.3d at p. 137, internal citation omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374, 384, footnote 9 [87 S.Ct. 534, 541, 17 L.Ed.2d 456], the court stated: "In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage."

- "There is a distinction between causes of action for invasion of privacy and defamation with regard to the respective interests protected and compensated by each. 'The gist of a cause of action in a privacy case is not injury to the character or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective.'" (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1135 [212 Cal.Rptr. 838], internal citations omitted.)

- "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307], internal citations omitted.)

- "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366 [92 Cal.Rptr.2d 713].)

- "The first type of appropriation is the right of publicity … which is 'in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.' The other is the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541–542 [18 Cal.Rptr.2d 790], internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Lines 10 –13: This suggested language is more positive rather negative, providing the jurors clearer guidance about what they should be doing (rather than solely what they should not do). See, e.g., Strunk & White, Elements of Style (New York: bartelby.com, 1999), Section III, Rule 12 ("Make definite assertions… Consciously or unconsciously, the reader is dissatisfied with being told only what is not; he wishes to be told what is. Hence, as a rule, it is better to express a negative in positive form.").

Elimination of the term "harm" clarifies that the jury's focus should be on quantifying "damages", which refers to a dollar value, as opposed to harm, which is an injury (and therefore not susceptible to reduction to an "amount").

The suggested language also draws a clearer line between speculation and estimation.

The case law tends to focus on the negative (e.g., "do not speculate") rather than the positive (e.g., "estimate"), presumably in an abundance of caution. Nonetheless, there is support for the common sense notion that juries should be instructed to estimate damages (since inevitably they do so regardless and must in many cases to reach a figure). Ross v. Frank W. Dunne Co. (1953) Cal.App.2d 690, 702 (quoting Schuler v. Bordelon (1947) 78 Cal.App.2d 581, 586) ("In determining the amount of damages that should be assessed against appellant herein, the jury was entitled to estimate as best they could from the evidence before them…. Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing damages….") (emphasis added); Zinn v. Ex-Cell-O Corp. (1944) 24 Cal.2d 290, 297 ("One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness.") (emphasis added). This concept of estimation applies likewise in contract actions. See, e.g., Phalanx Air Freight v. National Skyway Freight Corp. (1951) 104 Cal.App.2d 771, 776-77 (citing Schuler and Zinn). The concept of estimation also applies to awards of pain and suffering. See, e.g., Lemere v. Safeway Stores (1951) 102 Cal.App.2d 712, 726-27 (approving instruction beginning "in order to enable you to estimate the amount of such damages as you may allow for pain and suffering…") (emphasis added).

Alternative Proposal to Lines 10-15: The more modest proposal would be to retain the original language but to switch the second and third sentences. If the above proposal is not accepted, a more modest proposal would be warranted. The paragraph as it stands risks creating confusion through its back-and-forth phrasing: first, burden on plaintiff to prove damages; second, easing of burden by refusing to require exactitude; third, reassertion of burden by prohibiting guesswork. The alternative proposal (like the main proposal listed above) avoids this problem by grouping the "burdening" concepts together, and then describing the easing of the burden.

Lines 17-18: The Committee believes that the suggested change to the active voice makes for a clearer instruction.

1260
Damages Under Civil Code Section 3344

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. ~~However, [N~~*~~n~~ame of plaintiff*] must provide enough evidence of that amount so that you can reasonably estimate it without speculating or guessing. ~~does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages~~. However, [name of plaintiff] does not have to prove the exact amount of damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **Humiliation, embarrassment, and mental distress;**

2. **Harm to [*name of plaintiff*]'s reputation; [and]**

3. **[*Insert other item(s) of claimed harm*].**

If [*name of plaintiff*] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750.

In addition, [*name of plaintiff*] shall ~~may~~ recover any profits that [*name of defendant*] received from the use of [*name of plaintiff*]'s [name/voice/ signature/photograph/likeness] [that have not already been taken into account in computing the above damages]. To establish the amount of such profits you must:

1. Determine the gross, or total, revenue that [*name of defendant*] received from such use;

2. Determine the expenses that [*name of defendant*] had in obtaining the gross revenue; and

3. Deduct [*name of defendant*]'s expenses from the gross revenue.

[*Name of plaintiff*] must prove the amount of gross revenue, and [*name of defendant*] must prove the amount of expenses

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DIRECTIONS FOR USE

Give the bracketed phrase in the last full paragraph only if profits have been included in the calculation of actual damages.

The task force recognizes some ambiguity in Civil Code section 3344 regarding whether the minimum measure of damages is $750 plus profits or just $750. If the court decides that $750 is to be awarded as an alternative to all other damages, including profits, then the sentence regarding $750 should be moved to the end of the instruction.

SOURCES AND AUTHORITY

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)

State Bar Committee Comments on Proposed Changes

Lines 6 – 9: See comments to Instruction 1259 for the Committee's rationale for proposing change to the language regarding calculation of damage.

Line 23: The proposed change from 'may' to 'shall' renders the instruction more accurate and consistent with the mandatory language of Civil Code § 3344 ("[T]he person who violated the section shall be liable to the injured party or parties in an amount equal to [$70] or the actual damages suffered…, and any profits from unauthorized use…")

1830
Conversion—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully exercised control over [*name of plaintiff*]'s personal property. To establish this claim, [*name of plaintiff*] must prove the following:

1. That [***name of plaintiff***] [owned/possessed/had a right to possess] the [***insert item of personal property***];

2. That [***name of defendant***] intentionally [***insert one, two, or three of the following:***]

    - [took possession of the [***insert item of personal property***] for a significant period of time;]

    - [prevented [***name of plaintiff***] from having access to the [***insert item of personal property***] for a significant period of time;], or

    - [destroyed the [***insert item of personal property***];]

3. That [***name of plaintiff***] did not consent;

4. That [***name of plaintiff***] was harmed; and

5. That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.

SOURCES AND AUTHORITY

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Burlesci v. Petersen*

(1998) 68 Cal.App.4th 1062, 1066 [80 Cal.Rptr.2d 704], internal citations omitted.)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the University of California* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.' " (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598 [158 Cal.Rptr. 169], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- "Money can be the subject of an action for conversion if a specific sum capable of identification is involved. [¶] Neither legal title nor absolute ownership of the property is necessary. A party need only allege it is 'entitled to immediate possession at the time of conversion.' However, a mere contractual right of payment, without more, will not suffice." (*Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451–452 [61 Cal.Rptr.2d 707], internal citations omitted.)

- " 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*Farmers Insurance Exchange, supra*, 53 Cal.App.4th at pp. 1081–1082, internal citations omitted.)

- "Conversion is the wrongful exercise of dominion over the personal property of another. The act must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- "In order to establish a conversion, the plaintiff must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 278 [100 Cal.Rptr. 838], internal citations omitted.)

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544 [50 Cal.Rptr.2d 810], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American*

Empire Insurance Co. (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Personal Storage Inc.* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1990) Torts, § 610 et seq.

State Bar Committee Comments on Proposed Changes:

Line 8: Because there may be instances where either theory of liability could apply, two or three of the instructions (couched in the disjunctive) could be appropriate.

Line 15: This clarifies that the three prongs listed in element 2 are disjunctive.

1831
Trespass to Chattels—Essential Factual Elements

[***Name of plaintiff***] claims that [***name of defendant***] wrongfully trespassed on [***name of plaintiff***]'s personal property. To establish this claim, [***name of plaintiff***] must prove the following:

1. That [***name of plaintiff***] [owned/possessed/had a right to possess] the [***insert item of personal property***];

2. That [***name of defendant***] intentionally [***insert one or both of the following:***]

   [interfered with [***name of plaintiff***]'s use or possession of the [***insert item of personal property***];], or

   [damaged the [***insert item of personal property***];]

3. That [***name of plaintiff***] did not consent;

4. That [***name of plaintiff***] was harmed; and

5. That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.

DIRECTIONS FOR USE

Causes of action for conversion and trespass support an award for exemplary damages. *Krieger v. Pacific Gas & Electric Co.*, (1981) 119 Cal.App.3d 137, 148.

SOURCES AND AUTHORITY

- "Trespass to chattel, although seldom employed as a tort theory in California …, lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application—concerning the asportation of another's tangible property—to include even the unauthorized use of personal property: 'Its chief importance now,' according to Prosser, 'is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.' " (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567 [54 Cal.Rptr.2d 468], footnotes and internal citations omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1], internal citations omitted.)

- Restatement Second of Torts, section 218 provides:

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
(a) he dispossesses the other of the chattel, or
(b) the chattel is impaired as to its condition, quality, or value, or
(c) the possessor is deprived of the use of the chattel for a substantial time, or
(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

- Restatement Second of Torts, section 222, comment (a), states: "Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a

conversion. There may, however, be minor and unimportant dispossessions, such as taking another man's hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other's right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession."

- "It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property." (*Triscony v. Orr* (1875) 49 Cal. 612, 617, internal citations omitted.)

- "In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." (*eBay, Inc. v. Bidder's Edge, Inc.* (2000) 100 F.Supp.2d 1058, 1069–1070, internal citations omitted.)

- "The measure of damages in trespass is not the whole value of the property interfered with, but rather the actual diminution in its value caused by the interference. More important for this case, a judgment for conversion can be obtained with only nominal damages, whereas liability for trespass to chattels exists only on a showing of actual damage to the property interfered with." (*Pearson v. Dodd* (C.A.D.C 1969) 410 F.2d 701, 707, footnotes omitted.)

State Bar Committee Comments on Proposed Changes:

Line 8: Because there may be instances where either theory of liability could apply, both instructions (couched in the disjunctive) could be appropriate.

Line 12: This clarifies that the three prongs listed in element 2 are disjunctive.

Directions for Use: This authority is listed at the bottom of p. 79, and it applies to trespass to chattels.

1832
Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. [Name of plaintiff] must provide enough evidence of that amount so that you can reasonably estimate it without speculating or guessing ~~you must not speculate or guess~~. However, [name of plaintiff] does not have to prove the exact amount of damages. ~~However, [*name of plaintiff*] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages~~.

The following are the specific items of damages claimed by [*name of plaintiff*] [insert all that apply]:

1. **[The fair market value of the [*insert item of personal property*] at the time [*name of defendant*] wrongfully exercised control over it and interest from that time to the present;]**

   ~~*[or]*~~ *[and]*

   [Special damages resulting from [*name of defendant*]'s conduct.] and

2. **Reasonable compensation for the time and money spent by [*name of plaintiff*] in attempting to recover the [*insert item of personal property*]~~.~~, and**

3. **[~~Any~~ e~~E~~motional distress suffered by [*name of plaintiff*] as a result of [*name of defendant*]'s conduct.]**

If you decide to award damages, and those damages include an amount equal to the fair market value of the [item of personal property] at the time [name of defendant] wrongfully exercised control over it, the judge must also award interest on that fair market value amount. To be able to calculate such interest, the judge needs to know when [name of defendant] wrongfully exercised control over the [item of personal property]. On this

form, indicate the date when [name of defendant] wrongfully exercised control over the [item of personal property].

[In order to recover special damages, [*name of plaintiff*] must prove:

(a) That [*describe special circumstances that require a measure of damages other than value*];

(b) That it was reasonably foreseeable that special injury or harm would result from the conversion; and

(c) That reasonable care on [*name of plaintiff*]'s part would not have prevented the loss.]

["Fair market value" **means the highest price for which the property would sell on the open market, measured at the time of the wrong. ~~i~~In determining this price, you should assume that the buyer and sell would (1) have a reasonable time within which to buy and sell, (2) be ready, wiling, and able to sell but are not forced to do so, and (3) have a reasonable time and full opportunity to determine everything about the property that would be relevant to its value.** ~~is the highest price that a willing buyer would have paid to a willing seller, assuming~~:

~~That there is no pressure on either one to buy or sell; and~~

~~That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.]~~

DIRECTIONS FOR USE

If the jury chooses the fair market value prong of element 1, it should know that it should not calculate interest, but rather use the verdict form to tell the court the date of the conversion, so that the court can then calculate the interest from that date.

If the property has peculiar value to [name of plaintiff], and [name of defendant] acted willfully in depriving [him/her/it] of it, you may decide that that peculiar value is the appropriate measure of value in place of element 1, above.

Causes of action for conversion and trespass support an award for exemplary damages *Krieger v. Pacific Gas & Elec. Co.*, (1981) 119 Cal.App.3d 137,148.

The third element of listed damages, emotional distress, is bracketed because it appears that such damages are recoverable only if the second alternative measure of damages stated in the first paragraph of Civil Code section 3336 applies. (See *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464 [65 Cal.Rptr.2d 473].)

SOURCES AND AUTHORITY

- Civil Code section 3336 provides:

  The detriment caused by the wrongful conversion of personal property is presumed to be:

  > First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and
  > Second—A fair compensation for the time and money properly expended in pursuit of the property.

- Civil Code section 3337 provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."

- "[W]e are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty." (*Goldberg v. List* (1938) 11 Cal.2d 389, 393 [79 P.2d 1087].)

- "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116 [43 Cal.Rptr. 420], internal citations omitted.)

- "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. Accordingly, a person

claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result from the conversion." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [115 Cal.Rptr.2d 68], internal citations omitted.)

- "The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph of section 3336." (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209 [110 Cal.Rptr.2d 177], internal citations omitted.)

- "Civil Code section 3336 sets out the presumptive measure of damages in conversion, which is rebuttable, save and except when section 3337 applies. Under Civil Code section 3337, a defendant cannot rebut the presumption by claiming that he applied the converted property to plaintiff's benefit when he took unlawful possession of the property from the beginning. Consequently, the effect of section 3337 is to prevent mitigation when property is stolen from the plaintiff and subsequently applied to his benefit. In this situation, the defendant will not be able to claim that his conversion benefited plaintiff; he will thereby be prevented from claiming an offset derived from his original wrong. In contrast to this situation, if the particular facts of a case indicate, as in the instant case, that the possession was lawful before the conversion occurred … Civil Code section 3337 is inapplicable, and a converter is not precluded from claiming mitigation of damages." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 351–352 [142 Cal.Rptr. 126].)

- "[W]e conclude that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Gonzales, supra,* 56 Cal.App.4th at p. 477, internal citations omitted.)

- "In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in section 3336, Civil Code. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. Where damages for loss of use exceeds the legal rate of interest, it is appropriate

to award the former, but not both." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624–625 [177 Cal.Rptr. 314], internal citations omitted.)

- " 'To entitle a party to such compensation the [evidence] should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much.' Such evidence should be definite and certain. Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed as damages under Civil Code section 3336. Additionally, any such compensation must be fair, i.e., reasonable." (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 [239 Cal.Rptr. 178], internal citations omitted.)

- "[A]lthough good faith and mistake are not defenses to an action for conversion, the plaintiff's damages will be reduced if the defendant returns the property or the plaintiff otherwise recovers the property." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673 [192 Cal.Rptr. 793], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "Ordinarily 'value of the property' at the time of the conversion is determined by its market value at that time. However, '[w]here certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value ... against a willful wrongdoer.' " (*In re Brian S.* (1982) 130 Cal.App.3d 523, 530 [181 Cal.Rptr. 778], internal citations omitted.)

- "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted." (*Camp v. Ortega* (1963) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 873], internal citations omitted.)

  - "A plaintiff seeking recovery under the alternative provision of the statute must therefore plead and prove the existence of 'special circumstances which require a different measure of damages to be applied.' Having done so, the trier of fact must then determine 'whether it was reasonably forseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act.' " (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215 [193 Cal.Rptr. 322], internal citations omitted.)

  - "Defendants contend that the anticipated loss of profits is not 'the natural, reasonable and proximate result of the wrongful act complained of,' within the

meaning of section 3336. Although no California case which has applied the alternative measure of damages in a conversion case has specifically defined this language, we are satisfied that its meaning is synonymous with the term 'proximate cause' or 'legal cause.' These terms mean, in essence, 'that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.' In determining whether this connection exists, the question is whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act. This question being one of fact to be determined." (*Myers, supra,* 233 Cal.App.2d at p. 119–120, internal citations omitted.)

- "In exceptional circumstances, to avoid injustice, loss of profits may be the measure." (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794 [62 Cal.Rptr. 553], internal citation omitted.)

- Code of Civ. Pro. Section 1263.320(a) provides the definition of 'fair market value': 'The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for doing so, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1990) Torts, § 1455

State Bar Committee Comments on Proposed Changes:

Lines 6-9: First, this suggested language is more positive rather negative, providing the jurors clearer guidance about what they should be doing (rather than solely what they should not do). See, e.g., Strunk & White, Elements of Style (New York: bartleby.com, 1999), Section III, Rule 12 ("Make definite assertions. . . . Consciously or unconsciously, the reader is dissatisfied with being told only what is not; he wishes to be told what is. Hence, as a rule, it is better to express a negative in positive form").

Second, the suggested language fills the gap between "exact" and "speculate" "guess" by use of the term "estimate"

Third, the suggested language avoids the back-and-forth nature of the current language. The paragraph as it stands risks creating confusion through its back-and-forth phrasing: first, burden on plaintiff to prove damages; second, easing of burden by refusing to require exactitude; third, reassertion of burden by prohibiting guesswork. The suggested language avoids this problem by grouping the "burdening" concepts together, and then describing the easing of the burden.

Fourth, elimination of the term "harm" (end of line 7) clarifies that the jury's focus should be on quantifying damages, which are a dollar value, as opposed to harm, which is an injury (and therefore not susceptible of reduction to an "amount").

Support: Although the case law tends to focus on the negative (e.g., "do not speculate") rather than the positive (e.g., "estimate"), presumably in an abundance of caution, there is support for the common sense notion that juries should be instructed to estimate damages (since inevitably they do so regardless and must in many cases to reach a figure). See Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal. App. 3d 532, 545 ("[T]he jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly'") (cited in Sources & Authority section for Instructions 3000 (p. 334), 3001 (p. 337), 3002 (p. 340), and 3007 (p. 354); Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 702 (quoting Schuler v. Bordelon (1947) 78 Cal. App. 2d 581, 586) ("In determining the amount of damages that should be assessed against appellant herein, the jury was entitled to estimate as best they could from the evidence before them. . . . Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing damages…") (emphasis added). See also Zinn v. Ex-Cell-O Corp. (1944) 24 Cal. 2d 290, 297 ("One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness.") (emphasis added). This concept of estimation applies likewise in contract actions. See, e.g., Postal Instant Press v. Sealy (1996) 43 Cal. App. 4th 1704, 1708-09 (noting that damages should include those "future profits [that] can be estimated with reasonable certainty"); Phalanx Air Freight v. National Skyway Freight Corp. (1951) 104 Cal. App. 2d 771, 776-77 (citing Schuler and Zinn). The concept of estimation also applies to awards of pain and suffering. See, e.g., Lemere v. Safeway Stores (1951) 102 Cal. App. 2d 712, 726-27 (approving instruction beginning "in order to enable you to estimate the amount of such damages as you may allow for pain and suffering. . .") (emphasis added). Furthermore, the proposed instructions employ the term "estimate." See Instruction 852 (lost profits), line 7; Instruction 853 (lost profits), lines 7 & 21.

Note (other instances): Identical text (or text sufficiently similar to justify making this change uniformly to those Instructions as well) appears in a dozen other places: Instructions 850 (p. 35, lines 16-19), 2116 (p. 105, lines 6-8), 1259 (p. 81, lines 10-13), 1260 (p. 84, lines 10-13), 1109 (p. 86, lines 6-9), 1112 (p. 95, lines 10-13), 1113 (p. 98, lines 10-13), 2115 (p. 101, lines 6-9), 2618 (p. 219, lines 10-13), 2819 (p. 288, lines 6-9), 2820 (p. 289, lines 11-15), and 3121 (p. 420, lines 9-12). We recommend making this change in all of those instances as well.

Lines 22, 24 & 28: This change clarifies that the three types of damages are all recoverable. See Civil Code § 3336 (market value and time and money spent attempting to recover); Gonzales at 477, quoted atop p. 79 (emotional distress)

Line 30: This change makes the sentence clearer and more precisely focused on the harm suffered by this particular plaintiff in this particular situation. It also makes the element consistent with the preceding elements (i.e., although "any" reminds the reader that such an item may not exist in this situation, that is assumed, and such is also the case with element 2, lines 26-27, which lacks an introductory "any").

Lines 40-45: Cal. Civ. Proc. § 1263.320(a) defines "fair market value" as "The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so

doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for doing so, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

Directions for Use: This conforms to the law of In re Brian S., (1982) 130 Cal.App.3d 523, 530 cited at the bottom of p. 79. This is a significant enough aspect of the law that it merits placement in the directions for use, especially since it could warrant an additional instruction.

1902
Service Provider for Juror With Disability

[*Name of juror*] has been assisted by [a/an] [*insert type of service provider*] to communicate and receive information. The [*service provider*] will be with you during your deliberations. Except as may be necessary for [him/her] to carry out the service, ~~Y~~you may not discuss the case with the [*service provider*] or in any way involve the [*service provider*] in your deliberations. The [*service provider*] is not a member of the jury and [he/she] may not participate in any manner with any of you about the case except to assist [*name of juror*].

SOURCES AND AUTHORITY

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: … Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.
  (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this

section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

State Bar Committee Comments on Proposed Changes:

The substitute language is more consistent with what actually will be happening in the jury room; whereas the language in the instructions is confusing. For example, a service provider to hearing or speech impaired juror obviously will have to discuss the case with the jurors in a literal sense.

1904
Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that you are wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors

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SOURCES AND AUTHORITY

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye, supra,* 126 Cal.App.3d at p. 651.)

- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and

distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye, supra,* 126 Cal.App.3d at p. 651, internal citation omitted.)

State Bar Committee Comments on Proposed Changes:

The Committee did not choose to try to redraft this instruction. However, we believe that the language of the present BAJI Instruction No. 15.60 and would urge that it be adopted. BAJI Instruction No. 15.60 reads as follows:

> *BAJI 15.60 Deadlocked Jury Admonition*
>
> *Do your best to reach a verdict if you can reasonably do so. This case is important to the parties and has been expensive to try. If you fail to reach a verdict, the case will have to be tried by another jury selected in the same manner as you were. You are certainly as competent as any other jury.*
>
> *I am not suggesting that anyone should give up a conscientiously held opinion. However, I am asking each of you to listen with deference to the views of other jurors who do not agree with you and t o ask yourself if they may be right and you may be wrong in how you evaluate the evidence and apply it to the law. If you are convinced you are wrong, you must be willing to change your opinion and you should not hesitate to do so.*
>
> *Remember, it is your duty to try and reach a verdict if you can, and, bearing in mind what I have said, I am asking you to further deliberate in an effort to reach a verdict.*

2400
Breach of Express Warranty—Consumer Goods
Essential Factual Elements (Civ. Code, § 1794)

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s breach of a warranty that [*describe alleged express warranty*]. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] bought a[n] [*consumer good ~~product~~*] [from/distributed by/manufactured by] [*name of defendant*];**

2. **That [*name of defendant*] gave [*name of plaintiff*] a warranty by [*insert at least one of the following:*]**

   [making a written statement that [*describe alleged express warranty*];] [or]

   [showing [*name of plaintiff*] a sample or model of the [*consumer good ~~product~~*] and representing, by words or conduct, that [his/her] [*consumer good ~~product~~*] would match the quality of the sample or model;]

3. **That the [*consumer good ~~product~~*] [*insert at least one of the following:*]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [as set forth in the written statement];]

4. **That [*name of plaintiff*] delivered the [*consumer good ~~product~~*] to [*name of defendant*] or its authorized repair facilities for repair [unless [*name of plaintiff*] reasonably could not deliver the [*consumer good ~~product~~*] because of its [size and weight/method of attachment/method of installation] [or] [the nature of the defect] and notified [*name of defendant*] in writing of the need for repair];**

5. **That [*name of defendant*] or its representative failed to repair the [*consumer good ~~product~~*] to match the [written statement/represented quality] after a reasonable number of attempts; [and]**

6. **[That [*name of defendant*] did not replace the [*consumer product*] or reimburse [*name of plaintiff*] an amount of money equal to the purchase price of the [*consumer product*], less the value of its use by [*name of plaintiff*] before discovering the defect[s];]**

7. **That [*name of plaintiff*] was harmed; and**

8. **That [*name of defendant*]'s failure to [repair/replace/reimburse [*name of plaintiff*] for] the [*consumer product*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the [*consumer product*] or gave an opinion about the [*consumer product*]. General statements concerning customer satisfaction do not create a warranty.]

DIRECTIONS FOR USE

An instruction on the definition of "consumer product" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: "'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Elements 7 and 8 should be included only if plaintiff is claiming consequential damages. (see Civ. Code, § 1794.) Delete elements 7 and 8 if the plaintiff seeks to recover only reimbursement or restitution under the statute.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

Depending on the circumstances of the case, further instruction may be warranted to clarify how the jury should calculate 'the value of its use' during the time before discovery of the defect (in element 6).

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an … express warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:
  (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
  (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

(b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
(c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.2(d) provides, in part:

  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.
  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer … . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these

reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- Civil Code section 1795.5 provides, in part: Notwithstanding the provisions … defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id*. (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.,* Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, at § 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2001 supp.) at §§ 51, 55, 306–308, pp. 14–15, 92–101

State Bar Committee Comments Proposed Changes:

Lines 5, 14, 15,16, 18, 25, 27 & 34: Song-Beverly applies to consumer goods, whereas the Manguson-Moss Consumer Warranty Act (15 U.S.C. § 2301(1)) refers to consumer products. Since both are often alleged as bases for liability in separate counts within the same action, this construction avoids confusion.

Directions for Use: The committee felt that this term (lines 38-39) might be difficult for the jury to grasp. Since evidence will likely be adduced at each trial to guide the jury in making this calculation, a uniform instruction might not be plausible. However, flagging the issue for the judge and parties could be helpful.

2401
Breach of Express Warranty—New Motor Vehicle
Essential Factual Elements (Civ. Code, § 1794)

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s breach of a warranty. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] bought a[n] [*new motor vehicle*] [from/distributed by/manufactured by] [*name of defendant*];**

2. **That [*name of defendant*] gave [*name of plaintiff*] a written warranty that [*describe alleged express warranty*];**

3. **That the vehicle had a defect covered by the warranty that substantially impaired its use, value, or safety to [*name of plaintiff*];**

4. **That [*name of plaintiff*] delivered the vehicle to [*name of defendant*] or its authorized repair facilities for repair [unless [*name of plaintiff*] reasonably could not deliver the [*new motor vehicle*] because of the nature of the defect, and notified [*name of defendant*] in writing of the need for repair];**

5. **That [*name of defendant*] or its representative failed to service or repair it to match the written warranty after a reasonable number of opportunities to do so ~~attempts~~;**

6. **That [*name of defendant*] did not promptly replace or buy back the vehicle as requested by [*name of plaintiff*];**

7. **That [*name of plaintiff*] was harmed; and**

8. **That [*name of defendant*]'s breach of the written warranty was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

Elements 7 and 8 should be included only if plaintiff is claiming consequential damages. (see Civ. Code, § 1794.) Delete elements 7 and 8 if the plaintiff seeks to recover only reimbursement or restitution under the statute.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*new motor vehicle*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra,* 90 Cal.App.4th at p. 1101.)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an … express warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:
  (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
  (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.22(e)(2) provides, in part: "'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle … that is bought or used primarily for business purposes by a person … or any … legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion …, a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty. "

- "Under well-recognized rules of statutory construction, the more specific definition [of "new motor vehicle"] found in the current section 1793.22 governs the more general definition [of "consumer goods"] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)

- "'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.'" (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted.)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra,* 34 Cal.App.4th at p. 1250.)

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer . … However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' " (*Oregel, supra,* 90 Cal.App.4th at p. 1103, internal citation omitted.)

- ~~"[A] written service contract covering a used vehicle, under which the dealer 'undertakes to preserve or maintain the utility or performance' of the vehicle, is an 'express warranty' " covered by the Song-Beverly Consumer Warranty Act. (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1158 [67 Cal.Rptr.2d 543], disapproved on other grounds by *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6 [98 Cal.Rptr.2d 1].)~~

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id*. (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37

- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.,* Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, § at 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2001 supp.) at §§ 51, 55, 306–308, pp. 14–15, 92–101

State Bar Committee Comments on Proposed Changes:

Line 22: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

Testimony by the manufacturer could confuse the jury if the instruction is focused on "attempts" rather than "opportunities." For example, in Oregel, Isuzu's customer relations manager testified that "Isuzu treats a visit as a qualified repair attempt only when a part is taken off, replaced or adjusted, and if the mechanic is unable to diagnose the problem there is no repair attempt." Oregel at 1103 n.11 (emphasis added). This definition is directly at odds with the statutory law regarding "attempts," which could confuse the jury. See Oregel at 1103-04 ("Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."). However, if the jury is focused on "opportunities," it will be less easily misled by this kind of testimony.

The key issue is "opportunities." Oregel brought the car to the dealer 7 times for repair. Oregel at 1097-98. On 6 occasions, the dealer told Oregel that the oil leak was fixed when it returned the car to him. However, because the dealer only actually attempted to fix the leak on 1 occasion, and "merely looked for the source of the leak" on the other 5 occasions, Isuzu argued that Oregel failed to give it a reasonable opportunity to repair the oil leak. Oregel at 1103. The court rejected this approach. "Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." Oregel at 1103-04. The court then couches the inquiry as whether "Oregel satisfied the presentation element . . . [by] bringing the car in" 6 times. Oregel at 1104 (emphasis added). Again, the issue is not attempts made by the defendant/agent, but rather the chances (opportunities, presentations) it had to do so.

Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

Sources and Authority: This instruction applies only to new vehicles, but the cited case, Reveles, applies only explicitly to used vehicles. In addition, a subsequent case, Galvadon v. DaimlerChrysler Corp., 115 Cal. Rptr. 2d 732, 743-44 (Cal. App. 2002), the Fourth District Court of Appeal expressly distinguished Reveles and held that the statute does not cover service contracts (i.e., a service contract covering a new vehicle is not an express warranty). The California Supreme Court has granted review in Galvadon. Gavaldon v. DaimlerChrysler, 47 P.3d 222, 120 Cal. Rptr. 2d 429 (Cal. May 15, 2002) (No. S104477).

2402
Duration of Express Written Warranty

The warranty time period ~~stated time period for a written warranty~~ is lengthened by the number of days that the [*consumer good ~~product~~*] has been out of ~~was made available by~~ [*name of plaintiff*]'s hands for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control.

DIRECTIONS FOR USE

Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)

SOURCES AND AUTHORITY

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an … express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.
  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the

buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:24–53:25, pp. 29–31
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.15, pp. 245–246
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 309, p. 243

State Bar Committee Comments on Proposed Changes:

Line 1: This would be simpler and more readable.

Line 2: Song-Beverly applies to consumer goods, whereas the Magnuson-Moss Consumer Warranty Act (15 U.S.C. § 2301(1)) refers to consumer products. Since both are often alleged as bases for liability in separate counts within the same action, this construction avoids confusion.

Lines 2-3: Following the statutory language would be clearer as well as more precise.

2403
"Repair Opportunities ~~Attempts~~" Explained

Each time the [*consumer good ~~product~~*] was given to [*name of defendant*] [or its representatives] for repair ~~must be considered~~ counts as or constitutes an ~~attempt~~ opportunity to repair, even if [*name of defendant*] [or its representatives] did not do any repair work.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d) provides, in part:

  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. …
  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer.

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)

Secondary Sources

- 2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

State Bar Committee Comments on Proposed Changes:

Title: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read

so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

Testimony by the manufacturer could confuse the jury if the instruction is focused on "attempts" rather than "opportunities." For example, in Oregel, Isuzu's customer relations manager testified that "Isuzu treats a visit as a qualified repair attempt only when a part is taken off, replaced or adjusted, and if the mechanic is unable to diagnose the problem there is no repair attempt." Oregel at 1103 n.11 (emphasis added). This definition is directly at odds with the statutory law regarding "attempts," which could confuse the jury. See Oregel at 1103-04 ("Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."). However, if the jury is focused on "opportunities," it will be less easily misled by this kind of testimony.

The key issue is "opportunities." Oregel brought the car to the dealer 7 times for repair. Oregel at 1097-98. On 6 occasions, the dealer told Oregel that the oil leak was fixed when it returned the car to him. However, because the dealer only actually attempted to fix the leak on 1 occasion, and "merely looked for the source of the leak" on the other 5 occasions, Isuzu argued that Oregel failed to give it a reasonable opportunity to repair the oil leak. Oregel at 1103. The court rejected this approach. "Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." Oregel at 1103-04. The court then couches the inquiry as whether "Oregel satisfied the presentation element . . . [by] bringing the car in" 6 times. Oregel at 1104 (emphasis added). Again, the issue is not attempts made by the defendant/agent, but rather the chances (opportunities, presentations) it had to do so.

Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

Line 1: Song-Beverly applies to consumer goods, whereas the Magnuson-Moss Consumer Warranty Act (15 U.S.C. § 2301(1)) refers to consumer products. Since both are often alleged as bases for liability in separate counts within the same action, this construction avoids confusion.

Line 2: This would be simpler and more readable.

Line 3: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the

problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

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Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

2404
Reasonable Number of Repair Opportunities ~~Attempts~~—Rebuttable Presumption
(Civ. Code, § 1793.22(b))

~~The number of attempts to make repairs was reasonable if~~ [Name of plaintiff] gave [name of defendant] a reasonable opportunity to make repairs if [*name of plaintiff*] proves that within [18 months from delivery of the [*new motor vehicle*] to [him/her/it]~~/~~ or the first 18,000 miles whichever comes first] [*insert option A2, A3, A1, B2, B1, and/or C:*]

[A. 1. That the vehicle was made available to [*name of defendant*] [or its agent] for repair of the same defect two or more times; [and]

2. That the defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle was driven; [and]

3. [That [*name of plaintiff*] directly told [*name of manufacturer*] about the need to repair the defect;] [or]]

[B. 1. That the vehicle was made available to [*name of defendant*] [or its agent] for repair of the same defect four or more times; [and]

2. [That [*name of plaintiff*] directly told [*name of manufacturer*] about the need to repair the defect;] [or]]

[C. That the vehicle was out of service for repair of defects by [*name of defendant*] [or its agent] for more than 30 days.]

If [*name of plaintiff*] has proved these facts, then ~~the number of attempts to make repairs was reasonable unless~~ [name of plaintiff] gave [name of defendant] a reasonable opportunity to make repairs unless [*name of defendant*] proves that under all the circumstances [[*name of defendant*]/its agent] was not given a reasonable opportunity to repair the defect.

[The 30-day limit for repairing defects will be lengthened if [*name of defendant*] proves that repairs could not be made due to conditions beyond the control of [*name of defendant*] or its agent.]

DIRECTIONS FOR USE

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. The number these presumptive standards are '...markers on the path of reasonableness that the trier of fact must trod.' *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 886 (1989). Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, he may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles—see the Tanner Consumer Protection Act (Civ. Code, § 1793.22(b)).

The bracketed language in the first two optional paragraphs concerning notice directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer."

- Civil Code section 1793.22(b) provides, in part:

  It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:

  (1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual.

This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:27, pp. 33–34

- 2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

State Bar Committee Comments on Proposed Changes:

Title: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

Testimony by the manufacturer could confuse the jury if the instruction is focused on "attempts" rather than "opportunities." For example, In Oregel, Isuzu's customer relations manager testified that "Isuzu treats a visit as a qualified repair attempt only when a part is taken off, replaced or adjusted, and if the mechanic is unable to diagnose the problem there

is no repair attempt." Oregel at 1103 n.11 (emphasis added). This definition is directly at odds with the statutory law regarding "attempts," which could confuse the jury. See Oregel at 1103-04 ("Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."). However, if the jury is focused on "opportunities," it will be less easily misled by this kind of testimony.

The key issue is "opportunities." Oregel brought the car to the dealer 7 times for repair. Oregel at 1097-98. On 6 occasions, the dealer told Oregel that the oil leak was fixed when it returned the car to him. However, because the dealer only actually attempted to fix the leak on 1 occasion, and "merely looked for the source of the leak" on the other 5 occasions, Isuzu argued that Oregel failed to give it a reasonable opportunity to repair the oil leak. Oregel at 1103. The court rejected this approach. "Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." Oregel at 1103-04. The court then couches the inquiry as whether "Oregel satisfied the presentation element . . . [by] bringing the car in" 6 times. Oregel at 1104 (emphasis added). Again, the issue is not attempts made by the defendant/agent, but rather the chances (opportunities, presentations) it had to do so.

Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

Lines 1-3: This would be clearer and more in line with the chronological order of the actions the jury must evaluate. (E.g., the defect's nature (A2), then notice to the defendant (A3), then the number of opportunities to repair (A1).)

Lines 4-5: This is clearer and more precise, matching the language of § 1793.22(b).

Line 5: This would be clearer and more in line with the chronological order of the actions the jury must evaluate. (E.g., the defect's nature (A2), then notice to the defendant (A3), then the number of opportunities to repair (A1).)

Lines 25-27: This would be clearer and more in line with the chronological order of the actions the jury must evaluate. (E.g., the defect's nature (A2), then notice to the defendant (A3), then the number of opportunities to repair (A1).)

Directions for Use: : This emphasizes the breadth of the jury's inquiry – it can find for plaintiff without satisfying the prongs laid out in the instruction, or it can find for defendant despite so satisfying.

2405
Breach of Implied Warranty of Merchantability
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer product***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer product***] [from/ manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer products***] to retail buyers] [manufacturing [***consumer product***s]]; [and]**

3. **That the [***consumer product***] [***insert one or more of the following:***]**

[was not of the same quality as those generally acceptable in the trade]; [or]

[was not fit for the ordinary purposes for which such goods are used;] [or]

[was not adequately contained, packaged, and labeled;] [or]

[did not measure up to the promises or facts stated on the container or label;]

4. **That [***name of plaintiff***] was harmed; and**

5. **That the [***describe alleged defect***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/ model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Delete element 2 if the defendant is the manufacturer of the consumer product in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.

Elements 4 and 5 should be included only if plaintiff is claiming consequential damages. (Civ. Code, § 1794.)

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

SOURCES AND AUTHORITY

- Civil Code section 1794(a) provides: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation … under an implied … warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.1(a) provides:

  "Implied warranty of merchantability" … means that the consumer goods meet each of the following:
  (1) Pass without objection in the trade under the contract description.
  (2) Are fit for the ordinary purposes for which such goods are used.
  (3) Are adequately contained, packaged, and labeled.
  (4) Conform to the promises or affirmations of fact made on the container or label.

  Commercial Code § 2714(2) provides the formula for damages.

- Civil Code section 1792 provides, in part: "Unless disclaimed in the manner prescribed by [the act], every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty

that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."

- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. … [D]efendants' liability for an implied warranty does not depend upon any specific conduct or promise on their part, but instead turns upon whether their product is merchantable under the code." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 117 [120 Cal.Rptr. 681], internal citations omitted.) "…the implied warranty of merchantability can be breached only 'if the vehicle manifests a defect so basic it renders the vehicle unfit for its ordinary purpose of providing transportation…'" (page 1296). "[T]he implied warranty of merchantability is simply a guarantee that they will operate in a 'safe condition' and 'substantially free of defects'…'where a car can provide safe, reliable transportation[,] it is generally considered merchantable' [citation]."

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. … [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp.*, *supra*, 32 Cal.App.4th at p. 620.)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability … has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 … shall apply."

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at 1294, fn. 2, internal citation omitted.)

- Civil Code section 1794(b) provides, in part:

The measure of the buyer's damages in an action under this section shall include … the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 … is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. … 'As between the immediate parties to the sale [the notice requirement[is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697], internal citations omitted.)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:5–53:7, 53:31, pp. 11–13, 38–39
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.21–7.23, 7.25–7.26, pp. 250–254; *id.* Division 10: Leasing of Goods, at §§ 17.31–17.32, pp. 807–811
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 67–68, pp. 61–62; *id.* (2001 supp.) at § 68, p. 18

State Bar Committee Comments on Proposed Changes:

Sources and Authority: *This information would be helpful as well.*

2406
Breach of Implied Warranty of Fitness for a Particular Purpose
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer product***] was not suitable for [***name of plaintiff***]'s intended use. This is known as an "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer product***] [from/ manufactured by/distributed by] [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the [***consumer product***] for a particular purpose;**

3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [***name of defendant***]'s skill and judgment to select or provide a [***consumer product***] that was suitable for that particular purpose;**

4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment; [and]**

5. **That the [***consumer product***] was not suitable for the particular purpose;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the failure of the [***consumer product***] to be suitable was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/ model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Elements 6 and 7 should be included only if plaintiff is claiming consequential damages. (Civ. Code, § 1794.)

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

SOURCES AND AUTHORITY

- Civil Code section 1791.1(b) provides, in part: " 'Implied warranty of fitness' means … that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose."

- Civil Code section 1792.1 provides: "Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer's implied warranty of fitness."

- Civil Code section 1792.2(a) provides: "Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose."

Commercial Code § 2714(2) provides the formula for damages.

- "The Consumer Warranty Act makes … an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. … An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. … The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith*, *supra*, 173 Cal.App.3d at p. 25, internal citations omitted.)

- Civil Code section 1792.3 provides, in part: "[N]o implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this [act] affecting 'as is' or 'with all faults' sales are strictly complied with."

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. … [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of … the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 … shall apply."

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1294, fn. 2, internal citation omitted.)

- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include … the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 … is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. … 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697], internal citations omitted.)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:5–53:7, 53:31, pp. 11–13, 38–39
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.31–7.37, pp. 256–259; *id.*, at Division 10: Leasing of Goods, §§ 17.31–17.32, pp. 807–811
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 69–70, 72–74, pp. 63–67; *id.* (2001 supp.) at §§ 69–70, 72–74, p. 19

State Bar Committee Comments on Proposed Changes:

Sources and Authority: *This information would be helpful as well.*

2407
Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good* ~~*product*~~], unless a shorter period is stated in a writing that comes with the [*consumer good* ~~*product*~~], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.

[The time period of an implied warranty is lengthened by the number of days that the [*consumer product*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control].

DIRECTIONS FOR USE

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in Civil Code section 1795.5(c) (*i.e.,* no less than 30 days but no more than three months).

SOURCES AND AUTHORITY

- Civil Code section 1791.1 (c) provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an implied … warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are

repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- Civil Code section 1795.5 provides, in part: "[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under [the act] except: … [t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:7, pp. 12–13
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.15, pp. 245–246
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 309, p. 243

State Bar Committee Comments on Proposed Changes:

Lines 2-3: Song-Beverly applies to consumer goods, whereas the Magnuson-Moss Consumer Warranty Act (15 U.S.C. § 2301(1)) refers to consumer products. Since both are often alleged as bases for liability in separate counts within the same action, this construction avoids confusion.

2408
Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant*] is not responsible for any harm to [*name of plaintiff*] if [he/she/it] proves that any [defect[s] in the [*consumer good ~~product~~*]] [failure to match any [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [*consumer good ~~product~~*] after it was sold.

SOURCES AND AUTHORITY

- Civil Code section 1794.3 provides: "The provisions of this [act] shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:55, p. 66
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 306, p. 240

State Bar Committee Comments on Proposed Changes:

Lines 2 & 4: Song-Beverly applies to consumer goods, whereas the Magnuson-Moss Consumer Warranty Act (15 U.S.C. § 2301(1)) refers to consumer products. Since both are often alleged as bases for liability in separate counts within the same action, this construction avoids confusion.

2411
Reimbursement Damages—Consumer Goods

If you decide that [*name of defendant*] or its representative failed to repair or service the [*consumer product*] to match the [written warranty/represented quality] after a reasonable number of opportunities ~~attempts~~, then [*name of plaintiff*] is entitled to be reimbursed for the purchase price of the [*consumer product*], less the value of its use by [*name of plaintiff*] before discovering the defect.

[*Name of plaintiff*] must prove the amount of the purchase price, and [*name of defendant*] must prove the value of the use of the [*consumer product*].

DIRECTIONS FOR USE

This instruction is intended with use for claims involving consumer goods under the Song-Beverly Consumer Warranty Act. For claims involving new motor vehicles, see instruction 2412, *Restitution From Manufacturer—New Motor Vehicle*.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d)(1) provides, in part: "[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity."

- Civil Code section 1794(b) provides:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- "The clear mandate of section 1794 … is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of North. America, Inc.* (1994) 23 Cal.App.4th 174, 187–190 [28 Cal.Rptr.2d 371].)

- Civil Code section 1791.1(d) provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan, supra,* 23 Cal.App.4th at pp. 187–190.)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–101

State Bar Committee Comments on Proposed Changes:

Line 3: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

Testimony by the manufacturer could confuse the jury if the instruction is focused on "attempts" rather than "opportunities." For example, In Oregel, Isuzu's customer relations manager testified that "Isuzu treats a visit as a qualified repair attempt only when a part is taken off, replaced or adjusted, and if the mechanic is unable to diagnose the problem there is no repair attempt." Oregel at 1103 n.11 (emphasis added). This definition is directly at odds with the statutory law regarding "attempts," which could confuse the jury. See Oregel at 1103-04 ("Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."). However, if the jury is focused on "opportunities," it will be less easily misled by this kind of testimony.

The key issue is "opportunities." Oregel brought the car to the dealer 7 times for repair. Oregel at 1097-98. On 6 occasions, the dealer told Oregel that the oil leak was fixed when it returned the car to him. However, because the dealer only actually attempted to fix the leak on 1 occasion, and "merely looked for the source of the leak" on the other 5 occasions, Isuzu argued that Oregel failed to give it a reasonable opportunity to repair the oil leak. Oregel at 1103. The court rejected this approach. "Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." Oregel at 1103-04. The court then couches the inquiry as whether "Oregel satisfied the presentation element . . . [by] bringing the car in" 6 times. Oregel at 1104 (emphasis added). Again, the issue is not attempts made by the defendant/agent, but rather the chances (opportunities, presentations) it had to do so.

Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

Comment: It is unclear how the jury is supposed to calculate the time-value of use.

2412
Restitution From Manufacturer—New Motor Vehicle

If you decide that [*name of defendant*] or its representative did not repair or service the [*motor vehicle*] to match the [written warranty/represented quality] after a reasonable number of opportunities ~~attempts~~, then [*name of plaintiff*] is entitled to recover the price [he/she] proves [he/she] paid for the car, including:

1. The purchase price of the vehicle itself;

~~1.~~2. Charges for transportation and manufacturer-installed options;

~~2.~~3. Finance charges actually paid by [*name of plaintiff*]; and

~~3.~~4. Sales tax, license fees, registration fees, and other official fees.

You must subtract from the price any charges for items not supplied by [*name of defendant*].

[You must determine the vehicle's mileage between the time when [*name of plaintiff*] took possession of the vehicle and the time when [*name of plaintiff*] first delivered the vehicle to [*name of defendant*] or its authorized service and repair facility to fix the problem at issue in this case [*Name of defendant*] must prove the vehicle's mileage. Using this mileage number, I will reduce [*name of plaintiff*]'s recovery based on a formula.]

DIRECTIONS FOR USE

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see instruction 2411, *Reimbursement Damages—Consumer Goods*.

In lieu of restitution, plaintiff may request replacement with 'a new motor vehicle substantially identical to the vehicle replaced,' pursuant to Civil Code § 1793.2(d)(2)(A). If plaintiff so requests, elements 1-4 should be replaced with appropriate language.

SOURCES AND AUTHORITY

- Civil Code section 1794(b) provides:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1793.2(d)(2) provides, in part:

  If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

  (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which

the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10], internal citation omitted.)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187–190 [28 Cal.Rptr.2d 371].)

- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–101

State Bar Committee Comments on Proposed Changes:

Line 3: The term "attempts" really refers to the opportunities the defendant had to fix the problem, and the jury's focus should be on the plaintiff's actions (in providing the defendant an opportunity to fix the problem) rather than the defendant's attempts to fix the problem. This focus is important because it is the plaintiff who must satisfy these prerequisites before he can assert a valid claim. It is also important because the term "attempts" has been read so broadly by the courts that it has come to mean "opportunities:" when the defendant has an opportunity to fix the problem but fails to attempt, this is constructively termed an attempt. Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1103-04 (2001). The distinction becomes particularly important in Instruction 2404, where the language switches from "attempt" to "opportunity" (line 26), and the placement of the onus on the defendant or plaintiff becomes somewhat confusing. Therefore, although the statute refers to "attempts," the case law refers to "opportunities," and that seems clearer for a juror.

Testimony by the manufacturer could confuse the jury if the instruction is focused on "attempts" rather than "opportunities." For example, In Oregel, Isuzu's customer relations manager testified that "Isuzu treats a visit as a qualified repair attempt only when a part is taken off, replaced or adjusted, and if the mechanic is unable to diagnose the problem there is no repair attempt." Oregel at 1103 n.11 (emphasis added). This definition is directly at odds with the statutory law regarding "attempts," which could confuse the jury. See Oregel at 1103-04 ("Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."). However, if the jury is focused on "opportunities," it will be less easily misled by this kind of testimony.

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on 1 occasion, and "merely looked for the source of the leak" on the other 5 occasions, Isuzu argued that Oregel failed to give it a reasonable opportunity to repair the oil leak. Oregel at 1103. The court rejected this approach. "Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." Oregel at 1103-04. The court then couches the inquiry as whether "Oregel satisfied the presentation element . . . [by] bringing the car in" 6 times. Oregel at 1104 (emphasis added). Again, the issue is not attempts made by the defendant/agent, but rather the chances (opportunities, presentations) it had to do so.

Since the plaintiff bears the burden of presenting the defendant with a reasonable number of opportunities to repair the item, it is his actions that the jury must deem reasonable or unreasonable. Phrasing the instruction in terms of opportunities accomplishes this. By contrast, phrasing the instruction in terms of attempts shifts the focus to the defendant, and inquiring into the reasonableness of those attempts creates the backward notion that the more reasonable the plaintiff's actions (i.e., more opportunities offered), the more completely the "reasonable attempts" standard is satisfied, but this perversely cloaks the defendant's actions as reasonable.

Line 7: Because restitution includes the price of the car itself, it should be included. Excluding it could confuse the jury.

Line 21: There was disagreement in the Committee as to whether this change was warranted. There was some feeling that "the problem" is too vague, and could be incorrectly read to encompass any problem, and thus any time the plaintiff brought the vehicle in for repair of any problem (even one unrelated to the case). In contrast, other felt that the "the problem" is sufficiently clear.

Direction for Use: The plaintiff may elect to receive restitution or replacement.

2414
Consequential Damages

[*Name of plaintiff***] also claims additional amounts for [***list claimed consequential damages***].**

To recover these damages, [*name of plaintiff***] must prove:**

1. **That the damages resulted from [***name of plaintiff***]'s requirements and needs;**

2. **That [***name of defendant***] had reason to know of those requirements and needs at the time of the [sale/lease] to [***name of plaintiff***]; and**

3. **That [***name of plaintiff***] could not have reasonably prevented the damages.**

DIRECTIONS FOR USE

This instruction is intended for use where the plaintiff claims consequential damages pursuant to Commercial Code section 2715(2)(a) based on the plaintiff's foreseeable needs or requirements.

If appropriate, the following instruction may also be given: '[The manufacturer may have limited or excluded consequential damages in the warranty. If so, then you must determine whether that limitation or exclusion is unconscionable. If that limitation or exclusion is unconscionable, then it does not apply, and you should ignore it. However, if the limitation or exclusion is not unconscionable, then you must limit or exclude any award of consequential damages to the extent the manufacturer did so in the warranty.]' Comm. Code § 2719(3) ('Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable.').

SOURCES AND AUTHORITY

- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply.

- Commercial Code section 2712(2) provides, in part: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2715 provides, in part:

(2) Consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134].)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43

State Bar Committee Comments on Proposed Changes:

Instruction 2414: There was disagreement in the committee as to whether this instruction should be deleted.

The position in support of deleting the instruction rests on the following reasoning. Despite Bishop, the lack of a statute in the relevant code area granting consequential damages suggests the legislature's intent to disallow them. In other words, although Civil Code § 1793.2(d) specifically allows incidental damages, there is no mention of consequential damages. Therefore, § 2715(2)(a) is inapplicable. This instruction creates law, since no case has ever awarded consequential damages.

The position against deleting the instruction rests on the following reasoning. Because § 2715(2) explicitly applies and only concerns consequential damages, there must be some situations in which it applies, or else it would be a nullity. Bishop supports this notion, because it simply turns on whether the loss was actual as opposed to being merely based on "emotional distress." Bishop is consistent with the position that consequential damages (here, for loss of use) are recoverable. Thus, the instruction is correct and appropriate.

Directions for Use: If the defendant disclaims or limits consequential damages, then, as long as such disclaimer or limitation is not unconscionable, it applies.

2415
Civil Penalty–Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff*] claims that [*name of defendant*]'s failure to [*describe violation of Song-Beverly Consumer Warranty Act*] was intentional and therefore asks that you impose a civil penalty against [*name of defendant*]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to ~~discourage or~~ punish a defendant or discourage him/her/it from committing such violations in the future.

If [*name of plaintiff*] has proved that [*name of defendant*]'s failure was intentional, you may impose a civil penalty against [*name of defendant*]. You may not impose a civil penalty if you find that [*name of defendant*] believed reasonably and in good faith that [*describe facts negating statutory obligation*].

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff*]'s actual damages.

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). For a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2), see instruction 2416, *Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e))*.

SOURCES AND AUTHORITY

- Civil Code section 1794 provides, in part:

> (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
> ….
> (c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action … or with respect to a claim based solely on a breach of an implied warranty.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "[A] violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations." (*Kwan v. Mercedes-Benz of N. America* (1994) 23 Cal.App.4th 174, 185 [28 Cal.Rptr.2d 371].)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan, supra,* 23 Cal.App.4th at p. 184.)

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, p. 41
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–98, 100–101

State Bar Committee Comments on Proposed Changes:

This clarifies the purpose and nature of a civil penalty. The notion of simply "discouraging" a defendant in general is somewhat vague on its own; the goal of punitive damages is to discourage it from partic behavior. (Compare the use of "encourage" in the following instruction No. 2416.)

2416
Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e))

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you may impose a civil penalty if you find the following: ~~that [***name of defendant***] did not provide a qualified arbitration process for its customers. The purpose of this civil penalty is to encourage manufacturers to provide a dispute resolution process so that consumers do not have to file lawsuits.~~

1. [Name of defendant] had no qualified third-party dispute resolution process;

2. [Name of plaintiff] requested in writing that [name of defendant] or its representative repair of replace the vehicle;

3. [Name of defendant] failed to comply fully within 30 days of service of that request; and

4. You have not already awarded a civil penalty for a willful failure to comply with that request.

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff*]'s damages.

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff requests the jury to impose a civil penalty under Civil Code section 1794(e) based on defendant's failure to replace or provide restitution for a new motor vehicle pursuant to Civil Code section 1793.2(d)(2). For a civil penalty based on defendant's willful violation of another statutory obligation or an obligation under an applicable warranty, see instruction 2415, *Civil Penalty–Willful Violation (Civ. Code, § 1794(c))*.

Civil Code section 1793.22(d) defines a "qualified third-party dispute resolution process" as having nine elements. If the existence of a "qualified third-party resolution process" is a disputed issue, the jury may need further instructions based on the elements that are at issue.

SOURCES AND AUTHORITY

- Civil Code section 1794(e) provides:

(1) Except as otherwise provided in this subdivision, if the buyer establishes a violation of paragraph (2) of subdivision (d) of Section 1793.2, the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages.

(2) If the manufacturer maintains a qualified third-party dispute resolution process which substantially complies with Section 1793.22, the manufacturer shall not be liable for any civil penalty pursuant to this subdivision.

(3) After the occurrence of the events giving rise to the presumption established in subdivision (b) of Section 1793.22, the buyer may serve upon the manufacturer a written notice requesting that the manufacturer comply with paragraph (2) of subdivision (d) of Section 1793.2. If the buyer fails to serve the notice, the manufacturer shall not be liable for a civil penalty pursuant to this subdivision.

(4) If the buyer serves the notice described in paragraph (3) and the manufacturer complies with paragraph (2) of subdivision (d) of Section 1793.2 within 30 days of the service of that notice, the manufacturer shall not be liable for a civil penalty pursuant to this subdivision.

(5) If the buyer recovers a civil penalty under subdivision (c), the buyer may not also recover a civil penalty under this subdivision for the same violation.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act. [¶] Subdivision (e) of section 1794, which pertains only to suits involving violations of the 'replacement or reimbursement' provisions for new motor vehicles, also gives the trier of fact discretion to award civil penalties of up to two times the amount of the plaintiff's damages. However, subdivision (e) does not require a finding that the defendant's failure to live up to its legal obligations was willful." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507], footnotes omitted.)

- "Civil Code section 1794, subdivision (e) permits penalties when the consumer goods at issue are new motor vehicles and the buyer establishes a violation of the restitution or replacement provisions of section 1793.2, subdivision (d). It contains no willfulness requirement but does not apply if the manufacturer maintains a third party dispute resolution process which complies with section 1793.22. In such a case, a manufacturer may still be liable for a willful violation under section 1794, subdivision (c). [¶] A plaintiff cannot recover both types of penalties for the same violation."

(*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250 [40 Cal.Rptr.2d 576], internal citations omitted.)

- "The jury should be informed of the purpose of the penalty which it is being asked to consider. It should be told that imposition of the penalty is authorized by law as a means of encouraging manufacturers to resolve their disputes with consumers outside of litigation; that is, if the defendant had maintained a third party dispute resolution process for its customers, it would not be subject to the penalty. [¶] … [¶] … Lastly, the jury should be instructed on the following matters. Whether a penalty should be imposed on defendant is a matter left to its sound discretion and its discretion should be exercised without prejudice or passion. The exercise of such discretion should be based on the facts of the case as the jurors have determined them. … If the jury chooses to impose a penalty, the amount may be up to two times the amount of damages which plaintiff was awarded in the earlier trial. Such penalty would be paid by defendant. There is no definite or required method of determining a penalty nor is the opinion of a witness required as to the amount of a penalty. It is not necessary for the plaintiff to prove that the defendant acted willfully. However, the jury may take into consideration the nature of the defendant's conduct, including the extent to which the defendant did or did not act reasonably or in good faith, in (1) failing to honor plaintiff's demand for replacement of the defective vehicle or restitution, and (2) failing to establish a third party dispute resolution process which could have resolved this matter without litigation." (*Suman*, *supra*, 39 Cal.App.4th at pp. 1322–1323.)

- Civil Code section 1793.22(d) provides, in part:

  (d) A qualified third-party dispute resolution process shall be one that does all of the following:

  (1) Complies with the minimum requirements of the Federal Trade Commission for informal dispute settlement procedures as set forth in Part 703 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1987.

  (2) Renders decisions which are binding on the manufacturer if the buyer elects to accept the decision.

  (3) Prescribes a reasonable time, not to exceed 30 days after the decision is accepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decisions.

  (4) Provides arbitrators who are assigned to decide disputes with copies of, and instruction in, the provisions of the Federal Trade Commission's regulations in Part 703 of Title 16 of the Code of Federal Regulations as

those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, and this chapter.

(5) Requires the manufacturer, when the process orders, under the terms of this chapter, either that the nonconforming motor vehicle be replaced if the buyer consents to this remedy or that restitution be made to the buyer, to replace the motor vehicle or make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2.

(6) Provides, at the request of the arbitrator or a majority of the arbitration panel, for an inspection and written report on the condition of a nonconforming motor vehicle, at no cost to the buyer, by an automobile expert who is independent of the manufacturer.

(7) Takes into account, in rendering decisions, all legal and equitable factors, including, but not limited to, the written warranty, the rights and remedies conferred in regulations of the Federal Trade Commission contained in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, this chapter, and any other equitable considerations appropriate in the circumstances. Nothing in this chapter requires that, to be certified as a qualified third-party dispute resolution process pursuant to this section, decisions of the process must consider or provide remedies in the form of awards of punitive damages or multiple damages, under subdivision (c) of Section 1794, or of attorneys' fees under subdivision (d) of Section 1794, or of consequential damages other than as provided in subdivisions (a) and (b) of Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(8) Requires that no arbitrator deciding a dispute may be a party to the dispute and that no other person, including an employee, agent, or dealer for the manufacturer, may be allowed to participate substantively in the merits of any dispute with the arbitrator unless the buyer is allowed to participate also. Nothing in this subdivision prohibits any member of an arbitration board from deciding a dispute.

(9) Obtains and maintains certification by the Department of Consumer Affairs pursuant to Chapter 9 (commencing with Section 472) of Division 1 of the Business and Professions Code.

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, p. 41
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–98, 100–101

State Bar Committee Comments on Proposed Changes:

Lines 2-18: The existing text is incomplete and misleading. The suggested text encompasses the full range of § 1794(e), which is quoted in the Sources and Authority section.

There was disagreement in the committee as to whether this instruction should be deleted. The position in support of deleting the instruction rests on the following reasoning. Galvadon v. DaimlerChrysler Corp., 115 Cal. Rptr. 2d 732, 743-44 (Cal. App. 2002) addresses whether the arbitration process is legal at all. The California Supreme Court has granted review in Galvadon. Gavaldon v. DaimlerChrysler, 47 P.3d 222, 120 Cal. Rptr. 2d 429 (Cal. May 15, 2002) (No. S104477).

2500
Comparative Fault Between And Among Tortfeasors

[*Name of indemnitee***] claims that [he/she] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [name of plaintiff]"***] and that [***name of indemnitor***] must reimburse [***name of indemnitee***] based on [***name of indemnitor***]'s share of responsibility. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove the following:**

1. **That [***name of indemnitor***] [was negligent/[***describe underlying tort***]]; and**

2. **That [***name of indemnitor***]'s [negligence/[***describe tortious conduct***]] contributed as a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove the following:**

1. **That [***name of indemnitee***] [and] [***insert identification of others***] [was/were] [negligent/[***other basis of responsibility***]]; and**

2. **That [***name of indemnitee***]'s [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitee***], [***name of indemnitor***] [, and all other persons responsible] for [***name of plaintiff***]'s harm.]**

DIRECTIONS FOR USE

Read the last bracketed portion when indemnitor claims he or she was not the sole cause.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see instruction 311, *Apportionment of Responsibility*.

SOURCES AND AUTHORITY

- "In order to attain … a system … in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182], internal citation omitted.)

- "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202], internal quotation marks and citation omitted.)

- "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1997) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303].)

- "[W]e hold that . . . the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550].)

- For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781].)

- "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232].)

- Where there is a fault-free plaintiff, "[a]n insolvent defendant's shortfall [in payment of the judgment] should be shared proportionately by the solvent defendants as though the insolvent or absent person had originally not participated." (*Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87, 93 [191 Cal.Rptr. 531].)

- Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] (Labor Code section 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press).)

Secondary Sources

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Indemnity, Contribution, and Setoff, §§ 4:14–4:18, pp. 18–22

- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) General Principles, §§ 1.52–1.59, pp. 41–46 (rel. 4/00)

- 5 Levy et al., California Torts (1993) Comparative Negligence, §§ 74.01–74.13, pp. 74-6–74-54 (rel. 31-9/01)

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 89, pp. 162–163; *id.* (2001 supp.) at §§ 89–90A, 95, pp. 77–80

State Bar Committee Comments on Proposed Changes:

Title: This more accurately reflects the allocation of liability in the comparative fault context.

2600
Breach of Contractual Duty to Pay a Covered Claim/~~Indemnify Insured~~
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached its duty to pay [him/her/it] for a loss covered under an insurance policy. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insurer ~~plaintiff~~*] suffered a loss covered under an insurance policy with [name of defendant];**

2. **That [*name of insured ~~plaintiff~~*] was notified ~~reported~~ of the loss [as required by the policy];**

3. **That ~~[all or part of] the loss was covered under an insurance policy with~~ [*name of insurer ~~defendant~~*] failed to pay for [all or part of] the covered loss; and**

4. **The amount of the covered loss that [*name of insurer ~~defendant~~*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for first party coverage claims. Use bracketed language when needed. ~~For a claim arising under an insurance binder rather than an issued policy, see Instruction 2601, *Breach of Insurance Binder—Essential Factual Elements*~~ Use bracketed language when the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. If the policy at issue has been lost or destroyed, read Instruction 2605, *Lost or Destroyed Insurance Policy*. For instructions on general breach of contract issues, see the Contracts series.

SOURCES AND AUTHORITY

- "Wrongful failure to provide coverage or defend a claim is a breach of contract." (*Isaacson v. California Insurance Guarantee Assn.* (1988) 44 Cal.3d 775, 791 [244 Cal.Rptr. 655].)

Secondary Sources

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) General Principles of Contract and Bad Faith Actions, §§ 24.2, 24.23, pp. 885, 899–900

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:52, 15:924, pp. 15-8–15-9, 15-163

State Bar Committee Comments on Proposed Changes:

Throughout the instructions on Insurance, it is assumed the plaintiff is always the insured and the defendant always is the insured. In actuality the alignment sometimes is reversed. Indeed, at least one instruction deals with rescission where the alignment almost always is reversed. To avoid unnecessary confusion and re-writing, it is proposed for this series to replace "Name of plaintiff" with "name of insured" and to replace "name of defendant" with "name of insurer."

Title: Insurance typically breaks into two basic divisions. One type of coverage is for "first party" insurance where the insurer promises to pay for the value of something the insured has lost. The other type of coverage is where the insurer promises to defend and indemnify an insured for legal liability the insured has to a "third party." Consistent with this basic division, first party policies are said to protect against "loss" and third party policies are said to defend against "liability."

Instruction 2600 purports to address "indemnity" (a "third party concept") but then deals with "loss" (a first party concept). This tension between the title and the subject will cause confusion. The use instruction states a clear purpose to focus the instruction on "first party coverage." The text of the proposed instruction has to do with paying the insured for something it lost (a "first party concept"). However, the source and authority given deals with defending third party liability claims. This confusion must be eliminated and the Instruction must deal with either one ("first party") or the other ("third party") but not both.

Line 2: A minor change is to add "it" to "him/her" because insureds can be fictitious persons.

Lines 5-6: A significant problem is the order of stating the elements. First base in coverage is litigation usually is whether the "loss" is a covered "loss." Other proposed instructions in this area seem to recognize that fact by placing first in order the requirement that a loss is a covered loss.

Line 8-13: Insurers sometimes learn of a loss in ways other than from the insured. Where the circumstances create a dispute over whether the notification conformed with the policy requirements, the issue may be resolved by the Court as a matter of law or it may include a factual issue to be decided by the jury. In the latter case, the Court would include the bracketed wording. To implement change the third element would be changed.

2601
Breach of Insurance Binder
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached its duty to pay [him/her] for a loss or liability covered under a temporary insurance contract called an insurance binder. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insurer ~~defendant~~*] or its authorized agent agreed, orally or in writing, to provide [*name of insured ~~plaintiff~~*] with an insurance binder;**

2. **That [*name of insured ~~plaintiff~~*] paid ~~[or was obligated to pay]~~ for the insurance binder [or that payment was waived];**

3. **That [*name of insured ~~plaintiff~~*] suffered a loss covered under an insurance policy with [name of defendant]; ~~during the time the insurance binder was in effect~~;**

4. **That [*name of insured ~~plaintiff~~*] was notified ~~reported~~ of the loss or liability [as required by the insurance binder];**

5. **That ~~[all or part of] the loss was covered under the [insurance binder] [terms of the insurance policy~~ [*name of insurer ~~defendant~~*] failed to pay for [all or part of the covered loss ~~would have issued to [*name of plaintiff*]]~~; and**

6. **The amount of the covered loss or liability that [*name of insurer ~~defendant~~*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for an alleged breach of a contract of temporary insurance coverage. ~~The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately.~~ Use bracketed language when the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. Do not use this instruction unless the court has decided this issue.

Element number 5 should be modified if there is an issue regarding whether the insurance company's agent made oral statements at variance with the policy language.

Use bracketed language when needed. Note that the statutory requirements for a "binder" under Insurance Code section 382.5 do not apply to life or disability insurance, for insurance of any kind in the amount of $1 million or more, or to an oral binder (see Ins. Code, § 382.5(a)).

SOURCES AND AUTHORITY

- Insurance Code section 382.5 provides, in part: "A binder which is issued in accordance with this section shall be deemed an insurance policy for the purpose of proving that the insured has the insurance coverage specified in the binder. … Except as superseded by the clear and express terms of the binder, a binder shall be deemed to include all of the usual terms of the policy as to which the binder was given, together with applicable endorsements as are designated in the binder."

- Insurance Code section 481.1 provides:

  (a) In the event any conditional receipt, binder, or other evidence of temporary or implied insurance [with specified exceptions] is canceled, rejected, or surrendered by the insurer, the coverage thereby extended shall terminate 10 days after written notice to the named insured is deposited, properly addressed with postage prepaid, with the United States Postal Service.
  (b) Any conditional receipt, binder, or other evidence of temporary or implied insurance described in subdivision (a) shall remain in force for a period of at least 30 days from the date of its issuance unless sooner canceled, rejected, or surrendered pursuant to the provisions of subdivision (a).

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339].)

- "[A] binder is an independent contract, separate and distinct from the permanent insurance policy. It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern, supra,* 1 Cal.App.4th at p. 48.)

- "[P]racticality dictates that a temporary insurance binder issued upon an application for insurance cannot contain all of the details and terms of the proposed insurance contract. … [I]nsurance binders are adequate if they indicate the subject matter, the coverage period, the rate and the amount of insurance. (*National Emblem Insurance Co. v. Rios* (1969) 275 Cal.App.2d 70, 76 [79 Cal.Rptr. 583], internal citations omitted.)

- "Whether or not a valid binder exists is a question of fact insofar as a finding comprehends issues relating to the credibility of witnesses or the weight of the evidence, but a question of law insofar as a finding embraces a conclusion that such factual elements do not constitute a valid oral binder." (*Spott Electrical Co. v. Industrial Indemnity Co.* (1973) 30 Cal.App.3d 797, 805 [106 Cal.Rptr. 710], internal citations omitted.)

- "For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the company or until the policy can be properly issued. (2) The final contract or policy itself. … An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance. … This preliminary contract is sometimes called 'cover note' or 'binder.' … A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing." (*Parlier Fruit Co. v. Fireman's Fund Insurance Co.* (1957) 151 Cal.App.2d 6, 19–20 [311 P.2d 62], internal quotation marks and citation omitted.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.06[1]–[7], pp. 9-25–9-30.1 (rel. 30-6/97)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Determining Whether Enforceable Obligation Exists, §§ 5.17–5.20, pp. 196–199
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:101–2:137, pp. 2-20–2-27
- 1 Witkin, Summary of California Law (9th ed. 2002 supp.) Contracts, § 141A, pp. 81–82

State Bar Committee Comments on Proposed Changes:

Throughout the instructions on Insurance, it is assumed the plaintiff is always the insured and the defendant always is the insured. In actuality the alignment sometimes is reversed. Indeed, at least one instruction deals with rescission where the alignment almost always is reversed. To avoid unnecessary confusion and re-writing, it is proposed for this series to replace "Name of plaintiff" with "name of insured" and to replace "name of defendant" with "name of insurer."

The instruction is confusing because it fails to distinguish between first party and third party insurance and also fails to state it is intended for first party coverage. To be consistent with the apparent intention to make Instruction an expansion of Instruction 2601 to binders instead of policies, the same Instruction for Use (as modified above) should be inserted. If the Task Force intends this instruction to apply to liability coverage, then the phrase "or liability" should be added after "loss" wherever the word "loss" appears.

Second, the insert "[or was obligated to pay]" at line 9 is incorrect under Ahern v. Dillenback (1991) 1 Cal.App.4th 36, 47, cited in Sources and Authority. The premium must be paid or payment must be waived.

Fourth, the second paragraph in the Directions for Use for Jury Instruction 2605 (Lost or Destroyed Insurance Policy) should be added here too.

Finally, the following comment was made by some members of the Committee but others did not concur in this suggestion, believing the instruction was proper as phrased:

> *Without a use instruction directing the court's attention to the different burden of proof on oral contracts, the instruction creates a risk of confusion by including oral binders at line 6. Oral insurance contracts are subject to a clear and convincing standard, although Dart left open the burden as to written contracts. (See, e.g. Law v. Northern Assur. Co. (1913) 165*

Cal. 394, 400-401 ("while a parole contract of insurance may be made, proof of such an agreement must be clear and convincing."); Parlier Fruit Co. v. Fireman's Fund Ins. Co. (1957) 151 Cal.App.2d 6, 25 ("The evidence here is clear and convincing as there is no contradiction of the testimony...upon the subject of coverage.") K.C. Working Chem. Co. v. Eureka Security Fire & Marine Ins. Co. (1947) 82 Cal.App.2d 120, 133 ("the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject matter."); Engelman v. General Accident, Fire & Life Assur. Corp. (9th Cir. 1957) 250 F.2d 202, 209 ("We take it to be the settled law of California that there must be some clear and convincing evidence of an oral binder, or acceptance by someone in authority acting on behalf of the insurance company sought to be held...").) This should be pointed out in the Directions for Use.

2602
Breach of Contract for Temporary Life Insurance
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached an agreement to pay life insurance benefits. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insurer ~~defendant~~*] or its authorized agent received [*name of decedent*]'s application for life insurance;**

2. **That [*name of decedent*] paid the first insurance premium;**

3. **That [*name of decedent*] died [on/after/before] [*insert relevant date*]; and**

4. **The amount of the insurance benefits that [*name of insurer ~~defendant~~*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for an alleged breach of a contract of temporary life insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

SOURCES AND AUTHORITY

- Insurance Code section 10115 provides, in pertinent part: "When a payment is made equal to the full first premium at the time an application for life insurance … is signed by the applicant and … the insurer … approves the application … and the person to be insured dies … before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount … if a statement to this effect is included in the application."

- "We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. … The understanding of an ordinary person is the standard [that] must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy." (*Ransom v. Pennsylvania Mutual Life Insurance Co.* (1954) 43 Cal.2d 420, 425 [274 P.2d 633].)

- "[A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, … any such condition must be stated in conspicuous, unambiguous and unequivocal language which an ordinary layman can understand." (*Thompson v. Occidental Life Insurance Co.* (1973) 9 Cal.3d 904, 912 [109 Cal.Rptr. 473].)

- Temporary life insurance coverage "is not terminated until the applicant receives from the insurer both a notice of the rejection of his application and a refund of his premium." (*Smith Westland Life Insurance Co*. (1975) 15 Cal.3d 111, 120 [123 Cal.Rptr. 649].)

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] [automobile insurance].)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.07, pp. 9-30.1–9-35 (rel. 30-6/97)
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:134–2:137, 6:428–6:448, pp. 2-26–2-27, 6C-6–6C-10
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 137, pp. 160–161

State Bar Committee Comments on Proposed Changes:

No comments, except as to the plaintiff/insurer defendant/insured issue, largely because nobody in the group had encountered litigation on this subject. However, there are some areas for concern. For example, the first element seems to have the jury decide whether a person who receives a payment is an authorized agent. In practice, the Court likely would decide whether an agency existed but if a factual dispute puts this issue in the hands of the jury, obviously the jury needs more instruction on how to decide the issue and the question of whether an agent is an authorized agent should be detached from the first element and stated separately.

Another potential problem may arise over who paid the premium if someone other than the decedent paid the premium. Who paid it would seem irrelevant if the insurer was paid so the focus of the second element would be best placed on whether the insurer received payment.

2603
Insurance Policy Exclusion—Burden of Proof

The policy contains the following exclusion to coverage – meaning if the exclusion applies, [name of insured]'s [loss/liability] is not a covered claim [state exclusion under the policy]. [Name of insurer] contends that [name of insured]'s [liability/loss] is not covered because it is excluded from coverage under the exclusion I just read. [Name of insurer] must prove that [name of insured]'s [liability/loss] is excluded by the exclusion I just read. ~~[*Name of defendant*] claims that [*name of plaintiff*]'s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [*name of defendant*] must prove that [*name of plaintiff*]'s [liability/loss] [arises out of/is based on/occurred because of] [*state exclusion under the policy*].~~

DIRECTIONS FOR USE

This instruction can be used in cases involving either a third party liability or a first party loss policy.

SOURCES AND AUTHORITY

- "The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285], internal citation and quotation marks omitted.)

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537], internal citations omitted.)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)

Secondary Sources

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:911–15:912, p. 15-158
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121

State Bar Committee Comments on Proposed Changes:

The "to succeed" phrase at line 2 seems too close to a win/lose dichotomy to make the insurance counsel comfortable. Moreover, it is clearer if the Court instructs the jury about the effect of an exclusion and focuses attention on the exclusion at issue by stating it nearer to the outset of the instruction.

2604
Exception to Insurance Policy Exclusion—Burden of Proof

The policy contains the following exclusion to coverage – meaning if the exclusion applies, [name of insured]'s [loss/liability] is not a covered claim [state exclusion under the policy]. [Insert whichever of the following applies]:

a. If you find [name of insured]'s [loss/liability] is excluded under the exclusion I just read, [name of insured]'s [loss/liability] would nevertheless be a covered claim if the following exception to the exclusion applies: [state the applicable exception]. [Name of insured] contends that [his/her/its] [liability/loss] is covered because of the exception I just read. [Name of insured] contends that [his/her/its] [liability/loss] is covered because of the exception I just read. [or]

b. [Name of insured]'s [loss/liability] is excluded from coverage by the exclusion I just read unless the following exception to the exclusion applies: [state the applicable exception]. [Name of insured] contends [his/hers/its] [loss/liability] is a covered claim because of the exception I just read. [Name of insured] must prove that [his/her/its] [liability/loss] is covered because of the exception I just read.

~~**[***Name of plaintiff***] claims that his [liability/loss] is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, [***name of plaintiff***] must prove that his [liability/loss] [arises out of/is based on/occurred because of] [***state exception to policy exclusion***].**~~

DIRECTIONS FOR USE

Use this instruction only if the insurer is asserting that the insured's claim is subject to an exclusion. Where the jury is to determine the applicability of both the exclusion and the exception to an exclusion, Instruction 2604 should be given in conjunction with Instruction 2603 and part A of 2604 should be adopted. In cases where the Court determines, or the parties stipulate, the loss or liability falls within an exclusion, Instruction 2603 should not be used and part B of Instruction 2604 should be selected.

SOURCES AND AUTHORITY

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537], internal citations omitted.)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp., supra,* 18 Cal.4th at p. 1188.)

Secondary Sources

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:913–15:915.5, pp. 15-158–15-160
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121

State Bar Committee Comments on Proposed Changes:

The "to succeed" phrase at line 2 seems too close to a win/lose dichotomy to make the policyholder counsel comfortable. Moreover, it is clearer if the Court instructs the jury about the effect of an exception to an exclusion and focuses attention on the exception at issue by stating it nearer to the outset of the instruction.

2605
Lost or Destroyed Insurance Policy

[*Name of insured ~~plaintiff~~*] claims that [he/she] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] was insured under the lost policy during the period in question; and**

2. **That the terms of the policy included the following:**

   a. **[*describe each policy provision essential to the claimed coverage*].**

3. That [all or part of] [name of insured]'s [loss/liability] was covered under the listed policy terms.

[*Name of insured ~~plaintiff~~*] is not required to prove the exact words of the lost policy, but only the substance of the policy's terms I listed. ~~essential to [his/her] claim for insurance benefits.~~

DIRECTIONS FOR USE

Whether the terms of a lost policy must be established by a heightened degree of proof appears to be an open issue. The Supreme Court in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142], expressly declined to address the issue of the necessary degree of proof. (*Id* at p. 1072, fn. 4.)

This instruction is intended for use in cases where the plaintiff insured claims coverage for a loss under an insurance policy that was lost or destroyed without fraudulent intent on the part of the insured. The admission of oral testimony of the contents of a lost document requires the court to determine certain preliminary facts: (1) the proponent does not have possession or control of a copy of the policy; and (2) the policy was lost or destroyed without fraudulent intent on the part of the proponent. (Evid. Code, §§ 402(b), 1521, 1523(b).)

SOURCES AND AUTHORITY

- Evidence Code section 402(b) provides, in pertinent part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."

- Evidence Code section 1521(a) provides:

(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

- Evidence Code section 1523(b) provides, in pertinent part: "Oral testimony of the content of a writing is not … inadmissible … if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence."

- "In an action on an insurance policy that has not been lost or destroyed, it is well settled that '[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.' … We see no reason not to apply this rule to a policy that has been lost or destroyed without fraudulent intent on the part of the insured. Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the … defense,' i.e., any provision that functions to defeat the insured's claim. Those provisions, too, will be case specific." (*Dart Industries, Inc., supra,* 28 Cal.4th at p. 1068, internal citations and footnotes omitted.)

- "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc.*, *supra*, 28 Cal.4th at p. 1069.)

- "The rule … for the admission of secondary evidence of a lost paper, requires 'that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;' and further, 'the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.' " (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1068, internal citation omitted.)

- "No fixed rule as to the necessary proof to establish loss [of a written instrument], or what constitutes reasonable search, can be formulated. … The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge." (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41 [73 P. 803].)

"Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient." (*Guardianship of Levy* (1955) 137 Cal.App.2d 237, 249 [290 P.2d 320.)

Secondary Sources

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Identifying Sources of Coverage, § 8.8, p. 273
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:978–15:994, pp. 15-172–15-175
- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 48–50, 59–60, 63, 65, pp. 81–84, 91–97

State Bar Committee Comments on Proposed Changes:

The proposed instruction omits the critical element of directing the jury to determine whether the loss or liability is a covered claim. Also, the last paragraph invites juror speculation about what is "essential" and the court should already have determined what essential elements must exist for coverage.

2606
Covered and Excluded Risks—Predominant Cause of Loss

You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered ~~only~~ if the most important or predominant cause is a covered risk.

[[*Name of insurer ~~defendant~~***] claims that [***name of insured ~~plaintiff~~***]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [***name of insured ~~defendant~~***] must prove that the most important or predominant cause of the loss was [***describe excluded peril or event***], which is a risk excluded under the policy.]**

[or]

[[*Name of insured ~~plaintiff~~***] claims that the loss was caused by a risk covered under the policy. To succeed, [***name of insured ~~plaintiff~~***] must prove that the most important or predominant cause of the loss was [***describe covered peril or event***], which is a risk covered under the policy.]**

DIRECTIONS FOR USE

This instruction in intended for use in first party property insurance cases where there is evidence that a loss was caused by both covered and excluded perils. In most cases the court will determine as a question of law what perils are covered and excluded under the policy.

Depending on the type of insurance at issue, the court must select the bracketed paragraph that presents the correct burden of proof. For all-risk homeowner's policies, for example, once the insured establishes basic coverage, the insurer bears the burden of proving the loss was caused by an excluded peril. In contrast, for "named perils" policies (for example, fire insurance) the insured bears the burden of proving the loss was caused by the specified peril. (See *Strubble v. United Services Automobile Assn.* (1973) 35 Cal.App.3d 498, 504 [110 Cal.Rptr. 828].)

SOURCES AND AUTHORITY

- Insurance Code section 530 provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

- Insurance Code section 532 provides: "If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."

- "In determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31–32 [27 Cal.Rptr. 689], internal quotation marks and citation omitted.)

- "*Sabella* defined 'efficient proximate cause' alternatively as the 'one that sets others in motion,' and as 'the predominating or moving efficient cause.' We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 [257 Cal.Rptr. 292], internal citations omitted.)

- "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes. Frequently property losses occur which involve more than one peril that might be considered legally significant. … The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause. … On the other hand, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Garvey, supra,* 48 Cal.3d at pp. 406–407, internal quotation marks, italics, and citations omitted.)

- "[I]n an action upon an all-risks policy such as the one before us (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers all risks save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss." (*Strubble, supra,* 35 Cal.App.3d at p. 504.)

- "[T]he scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. … [T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 [2 Cal.Rptr.2d 183], internal citation omitted.)

Secondary Sources

- 3 California Insurance Law & Practice (Matthew Bender 2002) Homeowners and Related Policies, §§ 36.42[1]–[6], pp. 36-42–36-50.1 (rel. 28-12/96)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.42, pp. 100–101
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 6:134–6:143, 6:253, pp. 6A-29–6A-37, 6B-22

State Bar Committee Comments on Proposed Changes:

While the Committee felt a degree of unease over the proposed instruction, the only specific comment is to delete the word "only" from line 4 as being too argumentative. A suggestion to substitute "efficient proximate cause" for "most important" did not win support because the phrase "most important" was used in Garvey.

2607
Insurance Agency Relationship Disputed

[*Name of insured plaintiff***] claims that [***name of agent***] was [***name of insurer defendant***]'s agent and that [***name of defendant***] is therefore [responsible for/bound by] [***name of agent***]'s [conduct/representations].**

If [*name of insured plaintiff***] proves that [***name of insurer defendant***] gave [***name of agent***] the [authority/apparent authority] to act on behalf of [***name of insurer defendant***], then [***name of agent***] was [***name of insurer defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of insured plaintiff***] claims that [***name of agent***] was [[***name of insurer defendant***]/[***name of insured plaintiff***]]'s agent for the purpose of [***describe limited agency; e.g., "collecting insurance payments"***] and therefore [***describe dispute; e.g., "the insurer received insured's plaintiff's payment"***]. [***Name of insurer defendant***] claims that [***name of agent***] was [[***name of insurer defendant***]/[***name of insured plaintiff***]]'s agent for the purpose of [***describe limited agency***] and therefore [***describe dispute***].]**

DIRECTIONS FOR USE

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give Instruction 909, *Ostensible Agent*, in the Vicarious Liability series.

SOURCES AND AUTHORITY

- Insurance Code section 31 provides, in part: " 'Insurance agent' means a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." (See also Ins. Code, § 1621.)

- Insurance Code section 33 provides: " 'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an insurer." (See also Ins. Code, § 1623.)

- Civil Code section 2315 provides: "An agent has such authority as the principal, actually or ostensibly, confers upon him."

- "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced by a notice of agency appointment on file with the Department of Insurance. An agent is generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732–733 [276 Cal.Rptr. 667], internal citations omitted.)

- "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027], internal citations omitted.)

- "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors … ." (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)

- "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118], internal citations omitted.)

- "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra,* 115 Cal.App.2d at p. 244.)

- "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citations omitted.)

- Sending notice of an automobile accident to the insured's broker did not satisfy the insured's obligation under the policy to provide prompt notice of a claim to the insurer since the broker was the agent of the insured and not of the insurer. (*Arthur v. London Guarantee and Accident Co., Ltd.* (1947) 78 Cal.App.2d 198, 202–203 [177 P.2d 625].)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.02, pp. 9-5–9-8 (rel. 20-2/94)

- 5 California Insurance Law & Practice (Matthew Bender 2002) Operating Requirements of Agents and Brokers, §§ 61.01[4], pp. 61-10–61-12 (rel. 38-2/00)

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Determining Whether Enforceable Obligation Exists, §§ 5.4–5.8, pp. 186–191.

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Actions Against Agents and Brokers, §§ 29.2–29.5, pp. 1067–1070

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 2.12–2.24, 2.31–2.43, pp. 2-4–2-10

2608
Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements

[*Name of insurer*] claims that no insurance contract was created because [*name of insured*] [concealed an important fact/made a false representation] in [his/her] application for insurance. To establish this claim, [*name of insurer*] must prove the following:

That [*name of insured*] submitted an application for insurance with [*name of insurer*];

1. **That in the application for insurance [*name of insured*], intentionally or unintentionally, [failed to state/represented] that [*insert omission or alleged misrepresentation*];**

2. **[That the application asked for that information;]**

3. **That [*name of insured*] [*select one of the following:*]**

   [knew that [*insert omission*];]

   [knew that this representation was not true;]

4. **That [*name of insurer*] would not have issued the insurance policy if [*name of insured*] had stated the true facts in the application;**

5. **That [*name of insurer*] gave [*name of insured*] notice that it was rescinding the insurance policy; and**

7. That [*name of insurer*] [returned/offered to return] the insurance premiums paid by [*name of insured*].

DIRECTIONS FOR USE

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, 1691.)

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

SOURCES AND AUTHORITY

- Civil Code section 1689(b)(1) provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 650 provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

- Insurance Code section 330 provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

- Insurance Code section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

- Insurance Code section 334 provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point … the injured party is entitled to rescind the contract from the time the representation becomes false."

- "When the [automobile] insurer fails … to conduct … a reasonable investigation [of insurability] it cannot assert … a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co.* (1973) 9 Cal.3d 904, 915–916 [109 Cal.Rptr. 473], internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause …, the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415 fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished … ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. … [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) The Insurance Contract, § 8.10[1], pp. 8-44–8-46 (rel. 34-11/98)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2 – 21.12, 21.35–21.37, pp. 757–764, 785–786
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32, 5-32.1–5-54, 15-42–15-44

State Bar Committee Comments on Proposed Changes:

There was substantial disagreement about the correct state of the law in this area. the comments below were made by various committee members. None of the comments below expressed the views of the entire committee.

- *First, concern exists over combining misrepresentation and concealment in one instruction. It should be clear from the pleadings or evidence whether only one or both defenses are asserted. Separate instructions are needed for each defense. The duties to answer truthfully specific questions asked and to provide (regardless of whether asked) facts necessary and material to evaluating the risk sometimes invoke different principles. Thus, the third element (line 13) fails to account for situations where the insured knows material facts it is obligated to provide but withholds them from the insurer (concealment).*

- *Also, the knowledge of the insured in lines 17-19 is incomplete because it fails to incorporate the insured's knowledge of the significance of the omitted fact or to incorporate the significance of a mis-stated fact. See Thompson v. Occidental Life Ins. Co. (1973) Cal. 9 Cal. 3d 904, 916.*

- *Some of members felt there was a failure to incorporate the holdings of cases which provided that if the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. (Cohen v. Penn. Mut. Life Ins. Co., Supra, 48 Cal.2d 720, 726, 312 P.2d 241; Ransom v. Penn. Mutual Life Ins. Co., Supra, 43 Cal.2d 420, 426, 274 P.2d 633; McAuliffe v. John Hancock Mut. Life Ins. Co., Supra, 245 Cal.App.2d 855, 857, 54 Cal.Rptr. 288; Jefferson etc. Life Ins. Co. v. Anderson, 236 Cal.App.2d 905, 909-- 910, 46 Cal.Rptr. 480; MacDonald v. California-Western States Life Ins. Co., 203 Cal.App.2d 440, 448, 21 Cal.Rptr. 659; see Ins.Code, ss 332, 333.) Moreover, 'Questions concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' (Ransom, supra, 43 Cal.2d, p. 427, 274 P.2d 633, 637; see Cohen, supra, 48 Cal.2d, p. 725, 312 P.2d 241; Jefferson, supra, 236 Cal.App.2d, p. 910, 46 Cal.Rptr. 480; McAuliffe, supra, 245 Cal.App.2d, p. 857, 54 Cal.Rptr. 288; MacDonald, supra, 203 Cal.App.2d, p. 448, 21 Cal.Rptr. 659.) Finally, as the misrepresentation must be a material one, 'An incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer. (Citations.)' (Ransom, supra, 43 Cal.2d p. 427, 274 P.2d p. 637, see Burns v. Prudential Ins. Co., Supra, 201 Cal.App.2d 868, 872, 20 Cal.Rptr. 535.) And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed. (McAuliffe, supra, 245 Cal.App.2d, p. 858, 54 Cal.Rptr. 288.) Some members expressed the view that this line of authority was limited to the area of life insurance cases. Others believed it applied in all rescission circumstances*

- *Concern was also expressed by some members about the assumption in this instruction that the insurance is sought on an "application." Where the insurance is sought and obtained without the use of pre-printed application forms, a modification of the instruction is needed to avoid confusion.*

- *Some members also noted that this instruction only deals with a claim of rescission and fails to address concealment or misrepresentations as defenses to coverage. General Accident, Fire and Life Assur. Corp. v. Industrial Acc.*

Comm. (1925) 196 Cal. 179, 189. The use instruction is incomplete for this situation and is incorrect because it suggests notice of rescission is necessary where a defense is raised.

- *Some members believed that Paragraph 3 (line 13) is incomplete because it requires the insurer to ask for information. Ins. Code Sections 332 and 334 required disclosure of all material facts regardless of whether the insurer specifically requested it. Materiality is established as a matter of law if the insurer requests it. Materiality can be established even if the insurer requests it. Whether an omitted fact is material to the risk is something the court ordinarily will have determined as a matter of law. Other members disagreed pointing out that the claim here is not one of warranty, but for rescission for misrepresentation, thereby requiring an element of knowledge.. See the Thompson v. Occidental issue discussed above.*

- *There was concern expressed by some members regarding the tension between negligent omission and the knowledge element of paragraph 4. As stated above, the insured must have present knowledge of the facts. However, other authority shows the insured does not need to know the facts are untrue in order to set up the claim or defense. See Ins. Code Sections 359 and 360. Whether an insured should have known will, where this issue is presented, be the subject of testimony to address the materiality point addressed above. A use instruction should expand upon the issue of knowledge to alert the trial court to modify this instruction and conform it to the evidence of concealment/omission and knowledge and materiality.*

2609
Termination of Insurance Policy for Fraudulent Claim

[*Name of insurer*] claims that [*name of insured*] [is not entitled to recover under/is not entitled to benefits under] the insurance policy because [he/ she] made a false claim. To establish this claim, [*name of insurer*] must prove the following:

1. **That [*name of insured*] made a claim for insurance benefits under a policy with [*name of insurer*];**

2. **That [*name of insured*] represented to [*name of insurer*] that [*insert allegedly false representation*];**

3. **That [*name of insured*]'s representation was not true;**

4. **That [*name of insured*] knew that the representation was not true;**

5. **That [*name of insured*] intended that [*name of insurer*] rely on this representation in [investigating/paying] [*name of insured*]'s claim for insurance benefits; and**

6. **That the representation that [*insert allegedly false representation*], if true, would affect a reasonable insurance company's [investigation of/decision to pay] a claim for insurance benefits.**

DIRECTIONS FOR USE

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

SOURCES AND AUTHORITY

- Civil Code section 1689(b)(1) provides that a party may rescind a contract "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point … the injured party is entitled to rescind the contract from the time the representation becomes false."

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause …, the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415 fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. … [T]his would require the refund by [the insurer] of any premiums and the repayment by the [insureds] of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639], internal citation omitted.)

Secondary Sources

2 California Insurance Law & Practice (Matthew Bender 2002) The Insurance Contract, § 8.10[1], pp. 8-44–8-46 (rel. 34-11/98)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2 – 21.4, 21.35–21.37, pp. 757–759, 785–786

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160, 5:249–5:260.5, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32.2, 5-47–5-50, 15-42–15-44

State Bar Committee Comments on Proposed Changes:

This instruction suffered from the same disagreements expressed in connection with 2808. There was sharp disagreement regarding this proposed instruction.

First, concern was expressed by some members that paragraphs 5 and 6 of this proposed instruction 2609 misstate the test for false claims under Cummings v. Fire Ins. Exchange (1988) 202 Cal.App.3d 1407. Specifically, Paragraph 5 states that the insured intended the insurer to rely on the false representation in investigating and paying the claim, which Cummings does state. Id. at 1415-1416 fn. 7. But the Cummings decision adds that the insured's "intent to defraud the insurer is necessarily implied when the misrepresentation is material and the

insured wilfully makes it with knowledge of its falsity." Id. at 1418 (emphasis added), citing Claflin v. Commonwealth Ins. Co. (1884) 110 U.S. 81, 94-97. Paragraph 4 of this instruction states that the insured knew the representation was not true, and paragraph 6 states the test of materiality. If these requirements are met, then the "intent to defraud" requirement is "necessarily implied." Hence, paragraph 5 of this proposed instruction is unnecessary and improper. It adds an element to the defense that is not required to be proven where the requirements stated in paragraphs 4 and 6 are established. Other committee members believed that this instruction correctly stated the law.

Second, concern was expressed by some that Paragraph 6 of this proposed instruction misstates the test of materiality. The instruction states that information is material if it would affect a reasonable insurance company's investigation or decision to pay a claim. This implies that information is material only if the insurer would have reached a different decision on coverage if the insured had told the truth. In fact, a false statement is material under Cummings if it merely concerns a subject that is "reasonably relevant" to the insurer's investigation, and if "a reasonable insurer would attach importance to the fact misrepresented...." Cummings, supra, 202 Cal.App.3d at 1417. For example, false statements concerning the cause of the loss or other facts which potentially affect the existence of coverage are material as a matter of law. Id. at 1417. Thus, information does not have to be dispositive in order to be material, but merely must be relevant.

Finally, the statement under "Directions for Use" asserts that the instruction regarding false claims can be modified for use if the insurer raises concealment or misrepresentation as a defense to coverage. Concern was expressed by some that that statement is incorrect in several important respects:

(1) As noted above, the insured does not need to know that information is false in order to establish the defense of misrepresentation. Paragraph 4 of this proposed instruction does not accurately state the test for the defense of misrepresentation.

(2) Some members expressed the concern that Paragraph 5 of this instruction refers to intent to induce reliance, which is not a required element of the defense of concealment in the application for insurance. In Cohen, the insurer pled concealment as a defense to coverage, and the California Supreme Court rejected the insured's argument that concealment requires wrongful intent. The court held that: "concealment of a material fact, whether intentional or unintentional, vitiates an insurance policy.... the 'presence of an intent to deceive is not essential'...." Cohen, supra, 48 Cal.2d 720, 729 (citation omitted). The insurer established concealment as a defense in Cohen, and rescission was not involved. Similarly, in Williamson & Vollmer, supra, 64 Cal.App.3d 261, the court held that the insurer could plead concealment as a defense to coverage without rescinding. Id. at 275. The court also affirmed the trial court's holding that concealment of material facts precludes recovery "whether the non-disclosure was intentional or unintentional." Id. at 271. Moreover, the test of materiality stated in paragraph 6 of this proposed instruction is an objective test, which has nothing to do with the subjective test for materiality based on the insurer's probably response to undisclosed information, which applies where concealment is raised as a defense. Other members contended, that this is a required element under the appropriate authorities. An insured can not have a policy voided as a result of an innocent misrepresentation which he/she did not even intend that the insurer rely upon.

As a result of these concerns, the Committee was unable to arrive at a consensus on how to revise this instruction. It is suggested that this area of the law may also not be amenable currently to a "cook book" instruction.

2610
Affirmative Defense—Failure to Provide Timely Notice

[*Name of insurer ~~defendant~~*] claims that it does not have to pay the [judgment against/settlement by] [*name of insured ~~plaintiff~~*] because [*name of insured ~~plaintiff~~*] failed to give timely notice of the [lawsuit/[*insert other*]]. To succeed, [*name of insurer ~~defendant~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] did not give [*name of insurer ~~defendant~~*] notice [within the time specified in the policy/within a reasonable time] of the [lawsuit/[*insert other*]]; [or] [That [name of insurer] did not receive notice by some other means [within the time specified in the policy/within a reasonable time] of the lawsuit/insert other]]. and**

2. **That [*name of insurer ~~defendant~~*] was prejudiced by [*name of insured ~~plaintiff~~*]'s failure to give timely notice [or] [taken steps that should have substantially reduced or eliminated [name of insurer]'s liability under the policy.]**

To establish prejudice, [*name of insurer ~~defendant~~*] must show a substantial likelihood that, with timely notice, it would have [taken steps that would have substantially reduced or eliminated [*name of insured ~~plaintiff~~*]'s liability] [or] [settled for a substantially smaller amount].

DIRECTIONS FOR USE

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. The defense does not apply to "claims made" policies (see *Pacific Employers Insurance Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357–1359 [270 Cal.Rptr. 779]). This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

SOURCES AND AUTHORITY

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. Similarly, it has been held that prejudice must be shown with respect to breach of a notice clause." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr 827], internal citations omitted.)

- "[P]rejudice is not shown simply by displaying end results; the probability that such result could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285].)

- "In order to demonstrate actual, substantial prejudice from lack of timely notice, an insurer must show it lost something that would have changed the handling of the underlying claim. … To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Shell Oil Co. v. Winterthur Swiss Insurance Co.* (1993) 12 Cal.App.4th 715, 763 [15 Cal.Rptr.2d 815].)

- "California's 'notice-prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay. The rule was developed in the context of 'occurrence' policies." (*Pacific Employers Insurance Co., supra,* 221 Cal.App.3d at p. 1357.)

- "The 'general rule' is that an insurer is not bound by a judgment unless it had notice of the pendency of the action. … However, if an insurer denies coverage to the insured, the insured's contractual obligation to notify the insurer ceases." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 238 [178 Cal.Rptr. 343], internal citations omitted.)

Secondary Sources

- 4 California Insurance Law & Practice (Matthew Bender 2002) Liability Insurance in General, §§ 41.65[1]–[9], pp. 41-146–41-156 (rel. 33-6/98)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Identifying Sources of Coverage, §§ 8.24–8.26, pp. 286–288
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:917–15:920, pp. 15-160–15-161

State Bar Committee Comments on Proposed Changes:

Line 6: The change is necessary because notice can be received in various ways, not just from the insured or plaintiff.

Lines 13-14: At lines 13 to 16, the proposed instruction attempts to define the elements necessary to prove prejudice. The Committee is divided on whether this instruction accurately states all of the elements of prejudice. The instruction states the insurer must prove it would have taken steps to reduce or eliminate the insured's liability to the third party. However, it makes no mention of prejudice arising to the insurer because its defenses to coverage have been compromised by late notice. Case law supports including the latter element. National Auto & Cas. Ins. Co. v. Brown (1961) 197 CA2d 605, 609-610. The notion expressed in National Auto would be incorporated with the added text.

2611
Affirmative Defense—Insured's Breach of Duty to Cooperate in Defense

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[*Name of insurer ~~defendant~~*] claims that it does not have to pay the [judgment against/settlement by] [*name of insured ~~plaintiff~~*] because [*name of insured ~~plaintiff~~*] failed to cooperate in [his/her] defense. To succeed, [*name of insurer ~~defendant~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] failed to cooperate in the defense of the lawsuit against [him/her];**

2. **That [*name of insurer ~~defendant~~*] used reasonable efforts to obtain [*name of insured ~~plaintiff~~*]'s cooperation; and**

3. **That [*name of insurer ~~defendant~~*] was prejudiced by [*name of insured ~~plaintiff~~*]'s failure to cooperate in [his/her] defense.**

To establish prejudice, [*name of insurer ~~defendant~~*] must show a substantial likelihood that, if [*name of insured ~~plaintiff~~*] had cooperated, [*name of insurer ~~defendant~~*] would have [taken steps that would have substantially reduced or eliminated [*name of insured ~~plaintiff~~*]'s liability] [or] [settled for a substantially smaller amount].

DIRECTIONS FOR USE

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Depending on the facts of the case, the second element of this instruction may not always be necessary.

SOURCES AND AUTHORITY

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. … The burden of proving that a breach of a cooperation clause resulted in prejudice is on the insurer." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr 827, 384 P.2d 155], internal citations omitted.)

- "[W]e apprehend that *Campbell* stands for these propositions: (1) that breach by an insured of a cooperation . . . clause may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; (2) that prejudice is not presumed as a matter of law from such breach; (3) that the burden of proving prejudicial breach is on the insurer; and (4) that, although the issue of prejudice is ordinarily one of fact, it may be established as a matter of law by the facts proved." (*Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 141 [85 Cal.Rptr. 693].)

- "[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor." (*Billington v. Interinsurance Exchange of Southern California* (1969) 71 Cal.2d 728, 737 [79 Cal.Rptr. 326, 456 P.2d 982].

- "[I]f the trial court finds … that the insurer failed to diligently seek its insured's presence a finding that he breached the cooperation clause would not be justified." (*Billington, supra*, 71 Cal.2d at p. 744.)

- "[P]rejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883 fn. 12 [151 Cal.Rptr. 285].)

Secondary Sources

- 4 California Insurance Law & Practice (Matthew Bender 2002) Liability Insurance, §§ 41.64[1]–[11], pp. 41-137–41-146 (rel. 24-7/95)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Insured's Role in Defense, §§ 11.2–11.26, pp. 367–387
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:917–15:919, p. 15-160

State Bar Committee Comments on Proposed Changes:

One part of the Committee wants to incorporate the additional element of prejudice just mentioned under 2610. However, the addition of that element to the failure to cooperate context is problematic and lacks authority.

2613
Breach of the Implied Obligation of Good Faith and Fair Dealing
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached the obligation of good faith and fair dealing by unreasonably [failing to pay/delaying payment of] insurance benefits. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] suffered a loss covered under an insurance policy with [*name of insurer ~~defendant~~*];**

2. **That [*name of insured ~~plaintiff~~*] notified [*name of insurer ~~defendant~~*] of the loss [or] [That [name of insurer] did not receive notice by some other means [within the time specified in the policy/within a reasonable time] of the lawsuit/insert other]];**

3. **That [*name of insurer ~~defendant~~*] unreasonably [failed to pay/delayed payment of] policy benefits;**

4. **That [*name of insured ~~plaintiff~~*] was harmed by [name of insurer]'s unreasonable [failure to pay/delayed payment of] policy benefits; and**

5. **That [*name of insurers ~~defendant~~*]'s unreasonable [failure to pay/delayed payment of] policy benefits was a substantial factor in causing [*name of insured ~~plaintiff~~*]'s harm.**

DIRECTIONS FOR USE

For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 800, et seq).

SOURCES AND AUTHORITY

♦ Where an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. … [¶] … [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574–575 [108 Cal.Rptr. 480], italics in original.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "[T]he elements of the tort cannot be defined by the terms of the policy; for there to be a breach of the implied covenant, the failure to bestow benefits must have been under circumstances or for reasons which the law defines as tortious. … '[T]he mere denial of benefits, however, does not demonstrate bad faith.' " (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 15 [221 Cal.Rptr. 171], internal citation omitted.)

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' … In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Services Automobile Assn.* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chambray Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Insurance Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224].)

- "We conclude … that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. … [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.03[2][a]–[c], 13.06, pp. 13-17–13-23, 13-42–13-42.1 (rel. 42-6/01)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.30, 24.32, pp. 901–908
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:822–12:846.6, pp. 12C-7–12C-13

State Bar Committee Comments on Proposed Changes:

Line 14: The addition is needed because the harm must relate to the failure to pay/delay.

2614
Bad Faith (First Party)—Failure to Properly Investigate Claim
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached the obligation of good faith and fair dealing by failing to properly investigate [*name of insured ~~plaintiff~~*]'s loss. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] suffered a loss covered under an insurance policy with [*name of insurer ~~defendant~~*];**

2. **That [*name of insured ~~plaintiff~~*] notified [*name of insurer ~~defendant~~*] of the loss;**

3. **That [*name of insurer ~~defendant~~*] unreasonably failed to properly investigate the loss and [denied coverage/failed to pay insurance benefits/ delayed payment of insurance benefits];**

4. **That [*name of insured ~~plaintiff~~*] was harmed; and**

5. **That [*name of insurer ~~defendant~~*]'s unreasonable failure to properly investigate the loss was a substantial factor in causing [*name of insured ~~plaintiff~~*]'s harm.**

When investigating a claim, an insurance company has a duty to diligently search for, and to consider, evidence that supports an insured's claimed loss. An insurance company may not reasonably and in good faith deny payments to its insured without thoroughly investigating the grounds for its denial.

DIRECTIONS FOR USE

For instructions regarding general breach of contract issues, refer to the Contracts series (Instructions 800, et seq). This instruction must be given with 2613.

SOURCES AND AUTHORITY

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691].)

- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal.Rptr. 160], internal citation omitted.)

- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, … an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra,* 24 Cal.3d at p. 819.)

- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Insurance Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)

- "An unreasonable failure to investigate amounting to … unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. … [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)

- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)

- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra,* 150 Cal.App.3d at pp. 199–200.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.04[1]–[3], pp. 13-38.4–13-40.1 (rel. 33-6/98)

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Investigating the Claim, §§ 9.2, 9.14–9.22, pp. 302–303, 313–321

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:848–12:874, pp. 12C-14–12C-21

State Bar Committee Comments on Proposed Changes:

One member thought the instruction should be modified to read:

> *"An insurer unreasonably [fails to pay insurance benefits/denies coverage] and therefore breaches the covenant of good faith and fair dealing if it fails to properly investigate [name of insured]'s loss.*
>
> *You may find that [the insurance company] breached its obligation of good faith and fair dealing toward [name of insured] if you find:*
>
> 1. *that under the policy [name of insured] had the [right/obligation] to [describe right or obligation at issue; e.g. "to request arbitration within 180 days"] and*
> 2. *that [name of insurer] did not reasonably inform [name of insured] of [his/her/its] [rights/obligations] to [describe right or obligation]"*

2615
Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] breached the obligation of good faith and fair dealing by failing to reasonably inform [him/her] of [his/ her] rights and obligations under an insurance policy. To succeed, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] suffered a loss covered under an insurance policy with [*name of insurer ~~defendant~~*];**

2. **That [*name of insurer ~~defendant~~*] [denied coverage for/refused to pay] [*name of insured ~~plaintiff~~*]'s loss;**

3. **That under the policy [*name of insured ~~plaintiff~~*] had the [right/obligation] to [*describe right or obligation at issue; e.g., "to request arbitration within 180 days"*];**

4. **That [*name of insurer ~~defendant~~*] did not reasonably inform [*name of insured ~~plaintiff~~*] of his [right/obligation] to [*describe right or obligation*];**

5. **That [*name of insured ~~plaintiff~~*] was harmed; and**

6. **That [*name of insurer ~~defendant~~*]'s failure to reasonably inform [*name of insured ~~plaintiff~~*] was a substantial factor in causing [*name of insured ~~plaintiff~~*]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for use in appropriate cases where the insured alleges that the insurer breached the implied covenant of good faith and fair dealing by failing to reasonably inform the insured of his or her remedial rights and obligations under an insurance policy.

For instructions regarding general breach of contract issues, refer to the Contracts series (Instructions 800, et seq).

SOURCES AND AUTHORITY

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a

loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828].)

- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14–15 [233 Cal.Rptr. 76, 726 P.2d 267]; but see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178].)

- An insurer owes a duty to an additional insured under an automobile policy to disclose within a reasonable time the existence and amount of any underinsured motorist coverage. (*Ramirez v. USAA Casualty Insurance Co.* (1991) 234 Cal.App.3d 391, 397–402 [285 Cal.Rptr. 757].)

- "California courts have imposed a duty on the insurer to advise its insureds of the availability of and procedure for initiating arbitration; to notify him of a 31-day option period in which to convert his group insurance policy into individual coverage after termination; and to notify an assignee of a life insurance policy taken as security for a loan to the insured of previous assignments of the policy known to the insurer." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, § 13.05, pp. 13-40.1–13-42 (rel. 42-6/01)
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 11:46–11:47, 12:956–12:961, pp. 11-12–11-13, 12C-42–12C-44

2616
Bad Faith—Unreasonable Refusal to Settle Within Liability Policy Limits—Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims [he/she/it] was harmed by [*name of insurers ~~defendant~~*]'s breach of the obligation of good faith and fair dealing because it failed to accept a reasonable settlement demand in a lawsuit against [*name of insured ~~plaintiff~~*]. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That the lawsuit brought by [name of claimant] was for a claim covered by [name of insurer]'s policy. ~~That [*name of defendant*] undertook the defense of [*name of plaintiff*] in a lawsuit brought against him by [*name of claimant*];~~**

2. **That [*name of insurer ~~defendant~~*] unreasonably failed to accept a reasonable settlement demand from [*name of claimant*] for an amount within policy limits;**

3. **That a monetary judgment was entered against [*name of insured ~~plaintiff~~*] for a sum greater than the policy limits; and**

4. **The amount in excess of the policy limits that [*name of insured ~~plaintiff~~*] [paid/ is obligated to pay].**

"Policy limits" means the highest amount available under the policy for [*name of claimant*]'s claim against [*name of insured ~~plaintiff~~*].

A settlement demand is reasonable if in light of [*name of claimant*]'s injuries or loss and [*name of insured ~~plaintiff~~*]'s probable liability, the judgment in the lawsuit was likely to exceed the amount of the settlement demand.

DIRECTIONS FOR USE

This instruction is intended for use where the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 800, et seq).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

SOURCES AND AUTHORITY

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Communale v. Traders and General Insurance Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co.* (1967) 66 Cal.2d 425, 429 [58 Cal.Rptr. 13].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. … [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Automobile Assn. Inter-Insurance Bureau*, (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288], internal citation omitted.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- An insurer's decision to contest or settle a claim " 'should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained. [¶] This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised.' " (*Brown v. Guarantee Insurance Co.* (1957) 155 Cal.App.2d 679, 685–686 [319 P.2d 69], internal citation omitted.)

- "The [worker's] compensation-carrier consent prerequisite of a valid settlement is imposed by law. … In the absence of reasonable provisions for the legal rights of the [worker's compensation carrier], we conclude that [the insurer] cannot be held liable for bad faith 'rejection of a reasonable settlement offer,' or for failing 'to accept a reasonable settlement offer.' " (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 993 [136 Cal.Rptr. 331], internal citations omitted.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe, supra*, 66 Cal.App.3d at p. 994.)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. … Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Insurance Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "[A]n insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen*, *supra*, 15 Cal.3d at pp. 15–16, italics in original, internal citation omitted.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318], internal citations omitted.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.07[1]–[3], pp. 13-44–13-55 (rel. 40-11/00)

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Insurance Considerations in Settlement, §§ 14.35–14.37, 14.44–14.46, pp. 514–516, 520–522

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 12:225–12:360, 12:375–12:458 pp. 12B-7–12B-38, 12B-42–12B-68

State Bar Committee Comments on Proposed Changes:

Lines 6-9: An element is omitted. Namely, to prevail on a bad faith failure to settle, the insured must prove the policy covered the claim. Waller v. Truck Ins.Exch., Inc. (1995) 11 Cal.4th 1, 35-36.

One member thought the instruction should be rewritten as follows:

> ***"****The following principles apply in deciding whether the insurer acted unreasonably.*
>
> 1. *A settlement demand is reasonable if in light of [name of claimant]'s injuries of loss and [name of insured]'s probable liability, the judgment in the lawsuit was likely to exceed the amount of the settlement demand.*
>
> 2. *In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.*
>
> 3. *The size of a the judgment recovered against [name of insured] when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.*
>
> 4. *In deciding whether to contest or settle a claim, an insurer is required to make a diligent effort to ascertain the facts and circumstances upon which liability is predicated, and the nature and extent of the injuries so far as they reasonably can be ascertained."*

2617
Bad Faith—Advice of Counsel

[*Name of insurer ~~defendant~~*] did not breach the obligation of good faith and fair dealing if it reasonably relied on the advice of its lawyer. [*Name of insurer ~~defendant~~*]'s reliance was reasonable if:

1. **[*Name of insurer ~~defendant~~*] acted in reliance on the opinion and advice of its lawyer;**

2. **The lawyer's advice was based on full disclosure by [*name of insurer ~~defendant~~*] of all relevant facts that it knew, or could have discovered with reasonable effort;**

3. **[*Name of insurer ~~defendant~~*] reasonably believed the advice of the lawyer was correct; [and]**

4. **In relying on its lawyer's advice, [*name of insurer ~~defendant~~*] gave at least as much consideration to [*name of insured ~~plaintiff~~*]'s interest as it gave its own interest; [and]**

[5. [*Name of insurer ~~defendant~~*] was willing to reconsider and act accordingly when it determined that the lawyer's advice was incorrect.]

DIRECTIONS FOR USE

The "advice of counsel defense" is not a true affirmative defense, but rather negates an essential element of the insured's cause of action for bad faith. (See *State Farm Mutual Automobile Insurance Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725–726 [279 Cal.Rptr. 116].)

Advice of counsel is irrelevant, however, when an insurer denies coverage and for that reason refuses a reasonable settlement offer. (See, e.g., *Johansen v. California State Automobile Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288] ["an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer"].)

SOURCES AND AUTHORITY

- "An insurer may defend itself against allegations of bad faith and malice in claims handling with evidence the insurer relied on the advice of competent counsel. The defense of

advice of counsel is offered to show the insurer had 'proper cause' for its actions even if the advice it received is ultimately unsound or erroneous." (*State Farm Mutual Automobile Insurance Co., supra,* 228 Cal.App.3d at p. 725, internal citations omitted.)

- "If the insurer has exercised good faith in all of its dealings under its policy, and if the settlement which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment." (*State Farm Mutual Automobile Insurance Co., supra*, 228 Cal.App.3d at p. 725, internal citation omitted.)

- "[I]t is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all the facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith." (*Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936–937 [207 Cal.Rptr. 47] [intentional infliction of emotional distress action].)

- "Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it tends to show the insurer had proper cause for its actions. Because advice of counsel is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 228 Cal.App.3d at. pp. 725–726.)

- "An insurer's receipt of and reliance on [the written opinion of its legal counsel] is a relevant circumstance to be considered on the issue of its alleged bad faith." (*Mock v. Michigan Millers Mut. Insurance Co.* (1992) 4 Cal.App.4th 306, 329 fn. 20 [5 Cal.Rptr.2d 594].)

- "Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel." (*Fox v. Aced* (1957) 49 Cal.2d 381, 385 [317 P.2d 608].)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343], internal citation omitted.)

Secondary Sources

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Principles of Contract and Bad Faith Actions, §§ 24.52–24.55, pp. 923–926
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 12:1248–12:1260, pp. 12D-31–12D-34

2618
Damages for Bad Faith

If you decide that [*name of insured plaintiff***] has proved [his/her] claim against [***name of insurer defendant***], you also must decide how much money will reasonably compensate [***name of insured plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that was caused by [***name of insurer defendant***], even if the harm could not have been anticipated.

[*Name of insured plaintiff***] must prove the amount of [his/her] damages. However, [***name of insured plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of insured plaintiff***]:**

1. [Mental suffering/anxiety/humiliation/emotional distress;] [and]

2. [The cost of attorney fees to recover the insurance policy benefits;] [and]

3. [***Insert other applicable item of damage.***]

[No fixed standard exists for deciding the amount of damages for [***insert item of mental or emotional distress***]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.]

[To recover for future [***insert item of mental or emotional distress***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]

[To recover attorney fees [*name of insured plaintiff***] must prove that because of [***name of insurer defendant***]'s breach of the obligation of good faith and fair dealing it was reasonably necessary for [him/her] to hire an attorney to recover the policy benefits. [***Name of insured plaintiff***] may not recover attorney fees [he/she/it] incurred in attempting to obtain anything other than the policy benefits but not attorney fees [he/she/it] incurred for other purposes.]**

DIRECTIONS FOR USE

For instructions on damages for pain and suffering, see Instructions 2006, *Items of Noneconomic Damage*, and Instruction 2006A, *Physical Pain and Mental Suffering*. For instructions on punitive damages, see other instructions in the Damages series.

SOURCES AND AUTHORITY

- "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 [210 Cal.Rtr. 211].)

- "The fees recoverable … may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable. [¶] Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." (*Brandt, supra*, 37 Cal.3d at p. 819.)

- "If … the matter is to be presented to the jury, the court should instruct along the following lines: 'If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict.' " (*Brandt*, *supra*, 37 Cal.3d at p. 820.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, § 13.03[5][c], pp. 13-34–13-35 (rel. 40-11/00)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Principles of Contract and Bad Faith Actions, §§ 24.70–24.71, pp. 932–934

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 13:120–13:144, pp. 13-25–13-32

2619
Judgment Creditor's Action Against Insurer
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [*name of insurer ~~defendant~~*] must pay [all or part of] a judgment against [*name of insured*]. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. That [*name of insured ~~plaintiff~~*] brought a lawsuit for [personal injury/wrongful death/property damage] against [*name of insured*] and a judgment [after trial] was entered against [*name of insured*];

2. That [all or part of] [*name of insured*]'s liability under the judgment is covered by an insurance policy with [*name of insurer ~~defendant~~*]; and

3. That the insurance policy was issued or delivered to [name of insured] in California; and

4. ~~3.~~ The amount of the judgment [covered by the policy].

DIRECTIONS FOR USE

This instruction is intended for a judgment creditor's action against an insurer to collect on an insurance policy pursuant to Insurance Code section 11580(b)(2). The phrase "after trial" in brackets at line 7 may not be appropriate in all circumstances. See *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500. This instruction should be used only where there are factual issues on any of the above elements. This instruction may need to be augmented with instructions on specific factual findings.

SOURCES AND AUTHORITY

- Insurance Code section 11580(b)(2) provides, in pertinent part, that a liability policy must contain, and will be construed as containing if it does not: "[a] provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

- "A direct action under section 11580 is a contractual action on the policy to satisfy a judgment up to policy limits." (*Wright v. Fireman's Fund Insurance Co.* (1992) 11 Cal.App.4th 998, 1015 [14 Cal.Rptr.2d 588].)

- "[I]t is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580." (*People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London* (2002) 97 Cal.App.4th 1125, 1131–1132 [118 Cal.Rptr.2d 868].)

- "Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only when there has been an assignment of rights by, or a final judgment against, the insured." (*Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271 [83 Cal.Rptr.2d 702], internal citations omitted.)

- "Under section 11580 a third party claimant bringing a direct action against an insurer should … prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against [the] loss or damage …, 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against [the] loss or damage … ." (*Wright, supra,*11 Cal.App.4th at p. 1015.)

- "Under Insurance Code section 11580, a third party creditor bringing a direct action against an insurer to recover the proceeds of an insurance policy must *plead and prove* not only that it obtained a judgment for bodily injury, but that 'the judgment was against a person insured under a policy …' and 'the policy covers the relief awarded in the judgment … .' " (*Miller v. American Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847–848 [54 Cal.Rptr.2d 765], italics in original, internal citation omitted.)

- "[Insurance Code Section 11580(b)(2)] and the standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Insurance Co. of Pittsburgh, PA.* (1993) 15 Cal.App.4th 282, 285 [19 Cal.Rptr.2d 286].)

- "[W]here the insurer may be subject to a direct action under Insurance Code section 11580 by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. … Where an insurer has failed to intervene in the underlying action or to move to set aside the default judgment, the insurer is bound by the default judgment." (*Reliance Insurance Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386–387 [100 Cal.Rptr.2d 807], internal citations omitted.)

- "The [standard] 'no action' clause gives the insurer the right to control the defense of the claim—to decide whether to settle or to adjudicate the claim on its merits. …When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the

insurer." (*Safeco Insurance Co. of America v, Superior Court* (1999) 71 Cal.App.4th 782, 786–787 [84 Cal.Rptr.2d 43], internal citations omitted.)

- A standard "no action" clause in an indemnity insurance policy "provides that [the insurer] may be sued directly if the amount of the insured's obligation to pay was finally determined either by judgment against the insured after actual trial or by 'written agreement of the insured, the claimant and the company.' " (*Rose v. Royal Insurance Co. of America* (1991) 2 Cal.App.4th 709, 716–717 [3 Cal.Rptr.2d 483].)

- "[A] trial does not have to be adversarial to be considered an 'actual trial' under the 'no action' clause, or to be considered binding against the insurer in a section 11580 proceeding. … [W]e conclude that the term 'actual trial' in the standard 'no action' clause has two components: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion." (*National Union Fire Insurance Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449 [33 Cal.Rptr.2d 496].)

- "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code of Civil Procedure] section 877.6." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 729 [177 Cal.Rptr.2d 318].)

- "[W]hen … a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500, 509 [42 Cal.Rptr.2d 295].)

Secondary Sources

- 4 California Insurance Law & Practice (Matthew Bender 2002) §§ 41.60–41.63, pp. 41-117– 41-137 (rel. 44-2/02)

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Claimant's Direct Action for Recovery of Judgment, §§ 27.1–27.7, 27.17–27.27, pp. 1006–1014, 1017–1026.1

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:1028–15:1077, 15:1123–15:1136, pp. 15-185–15-194, 15-200.1–15-200.2

State Bar Committee Comments on Proposed Changes:

Line 7: The clause "after trial" is needed to cover the element discussed in Rose v. Royal Insurance Co. (1991) 2 CA4th 709. In actuality, the trial judge will decide whether the judgment is "after trial" and the jury will have no factual issue to decide. Thus, the first element will always be given as a factual statement rather than an element the jury is to determine.

Lines 12-13: An element is missing. Insurance Code Section 11580 requires that the policy be "issued or delivered to [a] person in this state." Thus, a new element 3 must be added.

2620
Negligent Failure to Obtain Insurance Coverage—
Essential Factual Elements

[*Name of insured ~~plaintiff~~*] claims that [he/she] was harmed by [*name of insurer ~~defendant~~*]'s negligent failure to obtain insurance requested by [*name of insured ~~plaintiff~~*]. To establish this claim, [*name of insured ~~plaintiff~~*] must prove the following:

1. **That [*name of insured ~~plaintiff~~*] requested [*name of insurer ~~defendant~~*] to obtain [*describe requested insurance*] and [*name of insurer ~~defendant~~*] promised to obtain that insurance for [*name of insured ~~plaintiff~~*];**

2. **That [*name of insurer ~~defendant~~*] was negligent in failing to obtain the promised insurance;**

3. **That [*name of insured ~~plaintiff~~*] was harmed; and**

4. **That [*name of insurer ~~defendant~~*]'s negligence was a substantial factor in causing [*name of insured ~~plaintiff~~*]'s harm.**

DIRECTIONS FOR USE

For general tort instructions, including the definition of "substantial factor," see the Negligence series (Instruction 300, et seq).

SOURCES AND AUTHORITY

- "A 'failure to deliver the agreed-upon coverage' case is actionable … . An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured.' A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury." (*Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 1110, 1119–1120 [55 Cal.Rptr.2d 276], internal citations omitted.)

- "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [19 Cal.Rptr.2d 676].)

- "[W]hile an insurance agent who promises to procure insurance will indeed be liable for his negligent failure to do so, it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

- 5 California Insurance Law & Practice (Matthew Bender 2002) Operating Requirements of Agents and Brokers, § 61.04[3][a], pp. 61-23–61-24.1 (rel. 31-11/97)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Actions Against Agents and Brokers, §§ 29.7–29.8, pp. 1072–1074
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:50–2:64.2, 11:246–11:249, pp. 2-12–2-18, 11-58–11-59

2700
Conspiracy—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of co-conspirator*]'s [*insert tort theory*] and that [*name of defendant*] is responsible for the harm because [*name of defendant*] was part of a conspiracy to commit [*insert tort theory*]. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.

~~**If you find that [*name of co-conspirator*] committed a [*insert tort theory*] that harmed [*name of plaintiff*], then you must determine if [*name of defendant*] is also responsible for the harm. [*Name of defendant*] is responsible if [*name of plaintiff*] proves the following:**~~

1. ~~**That [*name of defendant*] was aware that [*name of co-conspirator*] [and others] planned to [*insert wrongful act*]; and**~~

2. ~~**That [*name of defendant*] agreed with [*name of co-conspirator*] [and others] and intended that the [*insert wrongful act*] be committed.**~~

To establish this claim, [name of plaintiff] must prove the following:

1. That [name of defendant] agreed with [name of co-conspirator] [and others] [and others] to commit [insert alleged wrongful act];

2. That [name of co-conspirator] committed a [tort theory];

3. That this [tort theory] harmed [name of plaintiff]; and

4. That this [tort theory] was done in furtherance of the conspiracy to commit [alleged wrongful act].

~~**Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant*] responsible for the harm.**~~

DIRECTIONS FOR USE

Depending on the circumstances instructions that address any of the following points may be necessary or useful in the discretion of the trial court:

1. Regarding element 1, mere knowledge of a wrongful act is insufficient to make a defendant a responsible for the harm.

2. Regarding element 2, defendant can still be responsible even though he/she did not know of the co-conspirator's existence.

3. Regarding element 3, defendant can still responsible even though he/she did not personally participate in the act that actually harmed plaintiff.

4. Regarding element 4, an act is considered 'in furtherance of the conspiracy' if it is a foreseeable consequence of the conspiracy. This act need not be the same act the co-conspirators initially intended to perform.

SOURCES AND AUTHORITY

- "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511 [28 Cal.Rptr.2d 475], internal citations omitted.)

- "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339], internal citation omitted.)

- "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damages on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging … conspiratorial conduct is to implicate all … who agree to the plan to commit the wrong as well as those who

actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392], internal citations omitted.)

- "The elements of a civil conspiracy are '(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting.' " (*Mosier v. Southern California Physicians Insurance Exchange* (1988) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550], internal citations omitted.)

- " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 511, internal citations omitted.)

- "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157].)

- "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra,* 86 Cal.App.4th at p. 333, internal citations omitted.)

- "A cause of action for civil conspiracy may not arise … if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing ... . " (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183], internal citation omitted.)

- "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 514, internal citations omitted.)

- "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v.*

Children's Institute International (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437], internal citations omitted.)

- "We agree … that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier, supra,* 63 Cal.App.4th at p. 1048, internal citations omitted.)

- "Conspiracy liability may properly be imposed on nonfiduciary agents or attorneys for conduct which they carry out not simply as agents or employees of fiduciary defendants, but in furtherance of their own financial gain." (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 709 [282 Cal.Rptr. 627], internal citations omitted.)

- " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752], internal citations omitted.)

- "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate is not enough ... .' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543], internal citations omitted, disapproved on another ground in *Applied Equipment Corp., supra,* 7 Cal.4th at p. 521, fn. 10.)

- "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt, supra,* 24 Cal.3d at p. 785, internal citations omitted.)

- "It is a legal commonplace that the existence of a conspiracy may be inferred from circumstances, and that the conspiracy need not be the result of an express agreement but may rest upon tacit assent and acquiescence." (*Holder v. Home Savings & Loan Assn. of Los Angeles* (1968) 267 Cal.App.2d 91, 108 [72 Cal.Rptr. 704], internal citations omitted.)

- "Of course, the agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence that tends to show a common intent. In fact, in the absence of a confession by one of the conspirators, it is usually very difficult to secure direct evidence of a conspiracy, so that in the usual case the ultimate fact of a conspiracy must be determined from those inferences naturally and properly to be drawn from those matters directly proved." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 163 [300 P.2d 915], internal citations omitted.)

- "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Lines 19-29: Revising the instructions to include the statement of the four elements discussed above more accurately states the law and will improve readability and accuracy. First, the proposal lists as four numbered elements the four required prongs that are currently listed and the numbered elements 1 and 2.

The addition of element 4 highlights the notion that the defendant is liable for all foreseeable acts conducted by others in furtherance of the conspiracy, since the wrong aimed by the conspiracy and the act for which the defendant is allegedly liable need not be identical. Applied Equipment Corp. v. Litton Saudi Arabia Ltd., (1994) 7 Cal.4th 503; Widdows v. Koch, (1968) 263 Cal.App.2d 228

Directions for Use: The discussion concluded that any of the four may be needed in appropriate circumstances. The first is a shorter version of the text deleted from the current instruction. This gives the judge the flexibility to instruction on any or all of the four according to the proof and circumstances.

These three additional directions for use, plus the one moved to this section from lines 31-33, are together fairly lengthy, and should be selected on a case-by-case basis by the judge. Furthermore, these three additional instructions are important to help the jury fully understand the scope of conspiracy liability.

Applied Equipment Corp. v. Litton Saudi Arabia Ltd., (1994) 7 Cal.4th 503; Widdows v. Koch, (1968) 263 Cal.App.2d 228

2700A
Conspiracy

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged co-conspirators. [Name of plaintiff] is not required to prove that [name of defendant] personally committed a wrongful act or that [he/she] knew all the details of the agreement or the identities of all the other participants.

State Bar Committee Comments on Proposed Changes:

See Committee comments for instruction 2700.

2701
Ongoing Conspiracy

If you decide that [*name of defendant*] joined the conspiracy ~~to commit [*insert tort theory*]~~, then [*name of defendant*] is responsible for all acts done in furtherance of ~~as part of~~ the conspiracy, whether they occurred before or after [he/she] joined the conspiracy.

SOURCES AND AUTHORITY

- "It is the settled rule that 'to render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it.' Having been found to have joined and actively participated in the continuing conspiracy to convert, appellant became liable for the previous acts of his coconspirators under the rules relating to civil liability, and the fact that some of the missing goods may never have come into his possession would not absolve him from liability." (*De Vries v. Brumback* (1960) 53 Cal.2d 643, 648 [2 Cal.Rptr. 764], internal citations omitted.)

- "It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor. It is equally well settled that a party may be liable even if the intentional tort is commenced before he participates, if he, knowing the facts, then participates therein." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 168–169 [300 P.2d 915], internal citations omitted.)

- "[Defendant] could not join in a conspiracy that had been completed." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1595 [47 Cal.Rptr.2d 752], internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

The conspiracy has already been defined, so there is no need to further specify it. Also, adding the qualifier could confuse the jury, because many people would read "to" as "in order to", suggesting that the defendant intended to commit the tort in comparison to an intent to commit a wrongful act. Defendant must intend to cooperate to commit the wrongful act, but need not intend the tort actually committed.

The final change is intended to conform the instruction to that legal rule. The Committee did not think that "as a part of" was an adequate substitute for "in furtherance of".

3008
Secret Rebates—Definition of "Secret"

[Rebates/Refunds/Commissions/Unearned discounts/Services or privileges] are "secret" if they are concealed from or not disclosed to other buyers ~~other buyers did not know of such [rebates/ refunds/unearned discounts/special services or privileges] or if such buyers were not aware of their principal or important terms~~.

SOURCES AND AUTHORITY

"Viewing the evidence most favorably to [plaintiff], the nondisclosure of [defendant]'s receipt of maximum discounts to which it was not entitled certainly could be construed as a 'secret' allowance." (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02C.2
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

State Bar Committee Comments on Proposed Changes:

Lines 2-5: The Committee believes this language corrects the overly broad provisions of the original instruction and properly focuses the inquiry on the defendant's non-disclosure or concealment. The current instruction equates "secret" with the plaintiff simply not knowing about the discounts whereas applicable case law and secondary sources analyze "secret" in terms of the defendant's failure to disclose. The proposed change brings the instruction in line with these authorities.

3010
Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims
Closed-out, Discontinued, Damaged, or Perishable Items

[*Name of defendant*] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [*name of plaintiff*] [is/are] within the law because the [*product*] was being sold as [a close-out/seasonal goods/ damaged goods/perishable goods]. To succeed, [*name of defendant*] must prove the following:

1. **That [his/her/its] sales were [*insert one or more of the following:*]**

   [in the course of closing out, in good faith, all or any part of [his/ her/its] supply of [*product*], in order to stop trade in [*product*];] [or]

   [of seasonal goods to prevent loss by depreciation;] [or]

   [of perishable goods to prevent loss by spoilage or depreciation;] [or]

   [of goods that were damaged or deteriorated in quality;] and

2. **That [*name of defendant*] gave sufficient notice of the sale to the public.**

Notice is sufficient only if:

1. **The sale goods are kept separate from other goods;**

2. **The sale goods are clearly marked with the reason[s] for the sales; and**

3. **Any advertisement of such goods must set forth the reason[s] for the sale and indicate~~s~~ the number of items to be sold**

DIRECTIONS FOR USE

This defense applies to locality discrimination, below cost sales, and loss leader sales only.

SOURCES AND AUTHORITY

- **Business and Professions Code section 17050 provides, in part:**

  The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made:
  (a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof.
  (b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof. …
  The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold.

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

State Bar Committee Comments on Proposed Changes:

Lines 28-29: The statute appears to require this disclosure.

3100
Horizontal and Vertical Restraints
Price Fixing—Essential Factual Elements

[*Name of plaintiff***] claims [***name of defendant***] fixed prices. Price fixing is a mutual understanding, arrangement, or agreement to set, raise, lower, maintain, or stabilize the prices, price levels, price ranges, price formulae, or other terms of trade charged or to be charged for a product or service. To establish this claim, [*name of plaintiff*] must prove the following:**

1. **That [*name of defendant*] [and [*name(s) of alleged co-participant(s)*]] agreed to fix [*or*] [*set/raise/lower/maintain/stabilize*] prices [*or other terms of trade*] charged or to be charged for [*product/service*];**

2. **That [*plaintiff*] was harmed; and**

3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

If you find that all three of these elements are present , then price fixing has occurred, whether the prices agreed upon were high or low, reasonable or unreasonable, and even if the prices are the same as what [*name of defendant*] would have set on its own.

DIRECTIONS FOR USE

The Cartwright Act outlaws certain types of economic restraints. These restraints can be characterized as either "vertical" or "horizontal." A vertical restraint is a restraint involving entities at different levels of distribution (e.g., a manufacturer and wholesaler or retailer). A horizontal restraint is a restraint involving entities at the same level of distribution (e.g., two competing retailers). This instruction applies equally to cases involving horizontal or vertical restraints. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (3109, *Vertical Restraints—Termination of Reseller*; 3110, *Vertical Restraints—Agreement Between Seller and Reseller's Competitor*). For cases involving horizontal restraints, use this instruction but see additional special horizontal restraint instructions contained in this series (3101, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce*; 3102, *Horizontal Restraints—Dual Distributor*

Restraints; 3103, *Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation*; and 3104, *Horizontal Restraints—Group Boycott—Rule of Reason*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act prohibits combinations that fix aspects of price such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void." Business and Professions Code §§ 16720 (a)-(c).

- Business and Professions Code section 16720(d) and (e) provides:

> A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
> ….
> (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
> (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:
> (1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.
> (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.
> (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.
> (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

- " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18 Cal.Rptr.2d 308], quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849].)

- "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price-fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.3d 171, 188–189 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51

Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1237.)

- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without regard to any of its effects … ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841].)

- "'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' 'The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.' " (*Oakland-Alameda County Builders Exchange, supra,* 4 Cal.3d at pp. 361–362, internal citations omitted.)

- "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580].)

- "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders Exchange v. E. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 363 [93 Cal.Rptr. 602].)

- "These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1], internal citations omitted.)

- "Under the authorities … the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect." (*Mailand, supra,* 20 Cal.3d at p. 380.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "We acknowledge that a plaintiff … must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadow. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence." (*Aguilar, supra,* 25 Cal.4th at p. 857, internal citations omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1234.)

- Section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03–9.05
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

Many of these instructions have an element that plaintiff was "harmed". The Committee believes that the instructions need to specify that the harm was monetary in nature. The first sentence was simplified and switched being it was too long and may confuse jurors.

Some Committee members wanted to delete the reference to Cellular Plus, as it concerns pleading issues and is inconsistent with the instruction. Others contend that the Sources and Authority section is intended as a guide to practitioners – not an authoritative statement or interpretation of all available precedent; the inclusion of Cellular Plus is not an endorsement of any particular interpretation of the case.

3101
Horizontal Restraints (Use for Direct Competitors)
Allocation of Trade or Commerce—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] agreed to allocate [***customers/territories/products***]. An agreement to allocate [***customers/territories/products***] is an agreement between two or more competitors not to compete [***for the business of particular customers/with each other in particular territories/in the sale of a particular product***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [*name of defendant*] and [*co-participants*] were or are competitors in the same or related markets.**

2. **That [*name of defendant*] [and [*name alleged co-participant*] agreed to allocate [*customers/territories/products*];**

3. **That [~~*Plaintiff*~~*name of plaintiff*] was harmed; and**

4. **That [*name of defendant*]'s [and [*name of alleged co-participant*]'s] conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

DIRECTIONS FOR USE

The appropriate bracketed option(s) should be selected and the balance deleted, depending on the specific facts.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act." (*Guild Wineries & Distillers v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633–634 [162 Cal.Rptr. 87], internal citations omitted.)

- " 'One of the classic examples of a per se violation … is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. ... This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.' " (*Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46, 49 [111 S.Ct. 401, 112 L.Ed.2d 349], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily

illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51 Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

- Section 16750 (a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.07
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3103
Horizontal Restraints (Use for Direct Competitors)
Group Boycott—Per Se Violation—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] agreed not to deal with [*name of plaintiff*] [or to deal with [*name of plaintiff*] only on specified terms]. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] [and [*name of alleged co-participant[s]*]] agreed to [*specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"*] or deal only on specified terms;**

2. **That [*name of plaintiff*] was harmed; and**

3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

DIRECTIONS FOR USE

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(c) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

- "The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation

of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 194 [91 Cal.Rptr.2d 534], internal citation omitted.)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267–268 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. For … such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 365 [93 Cal.Rptr. 602], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " '[T]there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." (*Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 931–932 [130 Cal.Rptr. 1], internal citations omitted.)

- In *Marin County Bd. of Realtors, supra,* the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.11
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3105
Horizontal and Vertical Restraints
(Use for Direct Competitors or Supplier/Reseller Relations)
Other Unreasonable Restraint of Trade
Rule of Reason—Essential Factual Elements

~~[Name of plaintiff] claims that [name of defendant] agreed to [insert unreasonable restraint of trade]. To establish this claim, [name of plaintiff] must prove the following~~ **To establish the existence of an unreasonable restraint on trade, [*name of plaintiff*] must prove the following:**

1. **That [*name of defendant*] [and [*name of alleged co-participant[s]*]] agreed to [*describe conduct constituting an unreasonable restraint of trade*];**

2. **That the purpose or effect of [*name of defendant*]'s conduct was to restrain competition;**

3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**

4. **That [*name of plaintiff*] was harmed; and**

5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm**

DIRECTIONS FOR USE

This instruction is intended for actions that are limited only by the bounds of human ingenuity. Any such conduct, if it does not fit into a per se category, is judged under the rule of reason. Thus, the illegality of a termination that results from a buyer's disobedience with a seller's exclusive "dealing," territorial location, or customer restrictions, unless ancillary to price fixing, should be resolved under the rule of reason. For cases involving vertical restraints, also see special vertical restraint instructions contained in this series.

It is possible for a complaint to include both per se and rule of reason claims. Also, per se claims alternatively may be tested under the rule of reason if there is reason to believe that proof of the per se claims may fall short. If either is the case, connecting language between the pertinent instructions should be provided, such as: "If you find that [*name of defendant*]'s conduct did not amount to an agreement to [*specify conduct, e.g., "fix resale*

prices," "boycott," "allocate markets"], [*name of plaintiff*] may still prove that the conduct otherwise lessened competition."

For additional instructions regarding the rule of reason see instructions 3111 through 3114.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- Business and Professions Code section 16725 provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51 Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785], internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect,

actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize ... .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854–855, internal citations omitted.)

- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distributing Co. v. Beck and Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.03B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3106
Horizontal and Vertical Restraints—"~~Agreement~~ Mutual Understanding, Arrangement, or Agreement" Explained

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A mutual understanding, arrangement, or agreement exists if two or more persons or companies combine or join together for a common purpose. No written document is necessary for an agreement to exist. For [*name of defendant*] to be part of an agreement, [he/she/it] must have known [he/she/it] was joining in an agreement, even if [he/she/it] was not aware of all of its aspects.

[An agreement also may exist if a person or company unwillingly participates—that is, if another person coerces [him/her/it] to join the agreement against [his/her/its] wishes.]

[To prove the existence of an agreement, [*name of plaintiff*] must show more than a similarity between [*name of defendant*]'s conduct and the conduct of others. Independent business judgment in response to market forces sometimes leads competitors to act in a similar way because of their individual self-interests. That conduct alone is not enough to prove an agreement. However, similar behavior, along with other evidence suggesting joint conduct, may be used to decide whether there was an agreement.] Other evidence suggesting joint conduct may include the following:

1. Evidence that the similar conduct is contrary to the best interests of some of the persons or companies in question;

2. Evidence that the similar conduct lacks a legitimate business purpose;

3. Evidence that the similar conduct occurred following communications concerning the subject of said conduct; or

4. Evidence that [defendant] had an improper motive to engage in joint conduct.

Such evidence need not be shown by direct proof, but can also be demonstrated by circumstances or conduct.]

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [name of defendant] responsible for the harm.

In deciding whether [*name of defendant*]'s conduct was the result of an agreement, you may consider the nature of the acts done, the relationships between the parties, the interests of those who allegedly agreed, and other circumstances surrounding the conduct

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DIRECTIONS FOR USE

~~The third paragraph should be read only where a horizontal agreement is involved.~~

A mutual understanding, arrangement, or agreement to fix prices can involve a broad range of activities. Depending on the circumstances, price fixing can include, without limitation, including setting specific prices, setting price floors, establishing minimum or maximum prices, establishing a fixed markup or profit margin, or setting credit terms or other conditions or sale.

The third paragraph should be read only where a horizontal agreement is involved.

This instruction may be used in conjunction with the instructions on Indirect Evidence (202), Conspiracy (2700-2702) and Coercion (3108 - *Horizontal and Vertical Restraints — "Coercion Explained"*).

SOURCES AND AUTHORITY

- Business and Professions Code section 16720 provides, in part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: … To create or carry out restrictions in trade or commerce. …"

- "The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade." (*Kolling v. Dow Jones and Co., Inc.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[A] necessary 'conspiracy' or 'combination' cognizable as an antitrust action is formed where a trader uses coercive tactics to impose restraints upon otherwise

uncooperative businesses. If a 'single trader' pressures customers or dealers into pricing arrangements, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a trader to determine with whom it will deal." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 268 [195 Cal.Rptr. 211], internal citations omitted.)

- "In *United States v. International Harvester Co.,* 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927), the Court acknowledged as lawful, competitors' practice of independently, and as a matter of business judgment, following the prices of an industry leader. '[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.' " (*Wilcox, supra,* 815 F.2d at p. 526.)

- "[P]arallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns." (*City of Long Beach v. Standard Oil Co.* (9th Cir. 1989) 872 F.2d 1401, 1406.)

- "Price information published without 'plus factors,' which indicate an agreement, is judged under the rule of reason. If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, 'plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.' " (*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors* (9th Cir. 1986) 786 F.2d 1400, 1407, internal citations omitted.)

- "When defendants are shown to have entered into a conspiracy in violation of the antitrust laws, the courts will not assume that it has been abandoned without clear proof." *People v. Santa Clara Valley Bowling Proprietors Assn*, 238 Cal. App. 2d 225, 240 (1965).

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.04, 10.04
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

The Committee suggests consideration of the inclusion of the last paragraph of the Civil Conspiracy jury instruction (2700).

3106A
ONGOING CONSPIRACY

If you decide that [name of defendant**] participated in the mutual understanding, arrangement, or agreement to restrain trade ~~joined the conspiracy to commit [~~insert tort theory~~]~~, then [**name of defendant**] is responsible for all acts done in furtherance of ~~as part of~~ the ~~conspiracy~~ mutual understanding, arrangement or agreement, whether they occurred before or after [he/she] ~~joined the conspiracy~~ joined the mutual understanding, arrangement or agreement.**

3107
Horizontal and Vertical Restraints
Agreement Between Company and Its Employee

A mutual understanding, arrangement, or agreement requires two or more parties. A corporation, even if acting through its agents, officers, or employees, cannot form an agreement with itself. However, a corporation can enter into an agreement with an agent, officer, or employees if the agent, officer, or employee is acting in [*his/her*] own interest rather than the interest of the corporation.

[~~Plaintiff~~*Name of plaintiff*] claims that ~~. . . [same] . . .~~[*name of defendant's agent/employee/officer*], who is an [*agent/employee/officer*] of [*name of defendant*], had a mutual understanding, arrangement, or agreement with [*name of defendant*]. You may find that [*name of defendant's agent/employee/officer*] and [*name of defendant*] had the required mutual understanding, arrangement, or agreement only if you decide that [*he/she*] had a separate economic interest from [*name of defendant*] and acted in [*his/her*] own separate interest, and not in the economic interest of [*name of defendant*].

DIRECTIONS FOR USE

This instruction is intended to clarify the circumstances under which an employee, agent, or officer can form an unlawful agreement. The parties may wish to develop an example to illuminate the issue, such as an employee running a side business that may combine with the business of his employer to restrain trade.

SOURCES AND AUTHORITY

- "[T]he Act prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute." (*Lowell v. Mother's Cake and Cookie Co.* (1978) 79 Cal.App.3d 13, 23 [144 Cal.Rptr. 664], internal citation omitted.)

- "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones and Co., Inc.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citation omitted.)

- "It is also held that an individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute. The rationale of these decisions is that the acts of the agents or employees in

the operation of the business are the acts of the principal. … We are of the opinion that the language of section 16720 of the Business and Professions Code contemplates concert of action by separate individuals or entities maintaining separate and independent interests … ." (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677–678 [73 Cal.Rptr. 494], internal citations omitted.)

- "[I]t is well settled that a complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 266 [195 Cal.Rptr. 211], internal citations omitted.)

- "[Under the Sherman Act,] [t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769 [104 S.Ct. 2731, 81 L.Ed.2d 628], footnote omitted.)

- "[M]any courts have created an exception for corporate officers acting on their own behalf." (*Copperweld Corp., supra,* 467 U.S. at p. 769, fn. 15.)

- "We … need not reach the broader issue extensively argued in the amicus brief, i.e., whether the *Copperweld* rule would apply to the Cartwright Act when the conspiracy or combination in restraint of trade is purely intra-enterprise and there is no coerced or unwitting compliance by the victim in the forbidden activity." (*MacManus v. A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1111, fn. 4 [241 Cal.Rptr. 315].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.04B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3108
Horizontal and Vertical Restraints—"Coercion" Explained

Coercion is conduct of ~~a supplier~~ an entity that interferes with the freedom of a [competitor/reseller] to sell in accordance with his or her own judgment. [It may include a threat by [*name of defendant*] to stop doing business with [[*name of plaintiff*]/a reseller] or to hold back any product or service important to its competition in the market.] However, an entity's unilateral decision to deal or refuse to deal with a particular competitor or reseller cannot constitute coercion.

Coercion may be proven directly or indirectly. In deciding whether there was coercion, you may consider, among other factors, the following:

1. _____ **Whether [*name of defendant*] injured or threatened to injure [*name of plaintiff*] by increasing plaintiff's costs, causing other financial hardship, or otherwise punishing [*name of plaintiff*] for not following [*name of defendant*]'s suggestions;**

2. _____ **Whether [*name of defendant*] made or threatened to make an important benefit depend upon [*name of plaintiff*] following [*name of defendant*]'s suggestions;**

3. _____ **Whether [*name of defendant*] required [*name of plaintiff*] to get approval before doing something other than what [*name of defendant*] suggested; and**

4. _____ **The relative bargaining power of [*name of defendant*] and [*name of plaintiff*].**

DIRECTIONS FOR USE

In the first paragraph, second line, if the coercion is claimed to be horizontal, then the word "competitor" should be used instead of "reseller." In the first paragraph, fourth line, the word "reseller" should be used if the plaintiff is not the reseller.

SOURCES AND AUTHORITY

- "[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a 'single trader' pressures customers or dealers into adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements or illegal 'tieins,' an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- "A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws. It will thus be rare for a court to infer a vertical combination solely from a business's unilateral refusal to deal with distributors or customers who do not comply with certain conditions. Nonetheless, there is a line of cases that supports the proposition that a manufacturer may form a 'conspiracy' or 'combination' under the antitrust laws if it imposes restraints on dealers or customers by coercive conduct and they involuntarily adhere to those restraints." (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478, internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

- *Some Committee members suggested that the reference to Dimidowich in Sources and Authority be deleted. Other Committee members feel that the cases speak for themselves and, if not expressly overruled, should be included as a guide to practitioners – even if dicta, and even if arguably inconsistent with later cases.*

3110
Vertical Restraints
Agreement Between Seller and Reseller's Competitor

If a reseller coerces a supplier to refuse to do business with a competing reseller, and the supplier does so, this conduct is a mutual understanding, arrangement, or agreement to restrain competition. A mutual understanding, arrangement, or agreement to restrain competition exists where:

1. A reseller coerces a supplier to refuse to do business with a competing reseller, and the supplier does so; and

2. The supplier's conduct has the purpose and effect of unreasonably restraining competition.

Refusing to do business with a reseller after receiving complaints by a competing reseller is not, by itself, an agreement to restrain competition. Reseller requests or complaints do not, without more, constitute coercion. Rather, an agreement to restrain competition requires that a supplier and a competing reseller act deliberately and in concert to the detriment of another reseller.

~~If a reseller coerces a supplier to refuse to do business with a competing reseller is not, by itself, an agreement to restrain competition. However, if a supplier receives such complaints and then agrees with the complaining reseller to act on them, that becomes an agreement to restrain competition.~~

DIRECTIONS FOR USE

If the complaining competitor is also a named defendant, this instruction must be rewritten to reflect that circumstance.

SOURCES AND AUTHORITY

- In *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1043–1044 [219 Cal.Rptr. 203], the Court of Appeal held that proof that the reseller competing against the plaintiff complained to the seller about plaintiff's pricing and

that the seller then took action against the plaintiff reseller in response to the complaint was sufficient to support a finding of a combination.

- "[T]he plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852 [107 Cal.Rptr.2d 841].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04C
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

In Sources and Authority, some Committee members suggest that the reference to Aguilar be deleted. Other Committee members believe Aguilar is at least potentially applicable to a vertical restraint, and that including the reference does not foreclose a challenge to Aguilar's applicability in any particular case.

3111
Rule of Reason
Anticompetitive Versus Beneficial Effects

In deciding whether [*name of defendant*]'s challenged restraint had an anticompetitive or beneficial purpose or effect on competition, you should consider the results the restraint was intended to achieve or actually did achieve. In balancing these purposes or effects, you also may consider, among other factors, the following:

1. **The nature of the restraint; ~~The effect of the restraint on the business involved~~**

2. **The actual or probable effect of the restraint on the business involved; ~~The history of the restraint~~**

3. **The reasonableness of the stated purpose for the restraint;**

4. **The business to which the restraint was applied;**

5. **Business conditions before and after the restraint was applied;**

6. **The availability of less restrictive means to accomplish the stated purpose;**

7. **The portion of the market affected by the restraint; and**

8. **The extent of [*name of defendant*]'s market power.**

SOURCES AND AUTHORITY

- "The basic purpose of the antitrust laws is to prevent undue restraints upon trade which have a significant effect on competition. A contract, combination, or conspiracy is an illegal restraint of trade if it constitutes a per se violation of the statute or has as its *purpose* or *effect* an unreasonable restraint of trade. The determination of the existence of such an illegal restraint of trade turns upon findings of fact and involves 'weigh[ing] all of the circumstances of a case.' " (*Corwin v. Los Angeles Newspaper Service Bur.*

(1978) 22 Cal.3d 302, 314–315 [148 Cal.Rptr. 918], internal citations omitted and footnotes.)

- "Under the rule of reason, the court inquires into the nature and history of the restraint, as well as other relevant considerations." (*Reynolds v. California Dental Service* (1988) 200 Cal.App.3d 590, 596–597 [246 Cal.Rptr. 331], internal citations omitted.)

- "The 'rule of reason' permits certain restraints upon trade to be found reasonable. In order to determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' 'Whether a restraint of trade is reasonable is a question of fact to be determined at trial.' " (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 727 [187 Cal.Rptr. 797], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

Some members of the Committee suggest that item 8 – "the extent of [defendant's] market power" – be deleted, because there is a split of authority on the issue; compare Exxon Corp. v. Sup. Ct., (1997) 51 Cal.App.4th 1672, 1681 with Redwood Theatres, Inc. v. Festival Enterprises, Inc., (1988) 200 Cal.App.3d 687, 704. Other Committee members believe that the instruction is clear, and that item 8 is merely one of several non-exhaustive factors that the jury may consider. The Committee suggests that the Task Force identify the split in authority in a Direction for Use.

3112
Rule of Reason
"Market Power" Explained

Market power is the ability to increase prices or reduce output or production without losing market share. The higher a seller's market share, *i.e.*, customers, the more likely it has market power.

In deciding whether a seller has market power, (whether the seller created that market power or not), you should also consider how difficult it is for a potential competitor to successfully enter the market. The more difficult it is to successfully enter a market, the more likely a seller has market power within that market. Market power is less likely to exist if it is not difficult for potential competitors to enter a market successfully. A seller also can have market power if he sells a unique product or serves a captive customer base that is locked-in to the seller's products or services.

~~A seller also can have market power if he sells a unique product or serves a captive customer base that is locked-in to the seller's products or services.~~ **A market is defined by both product (what is sold) and geography (where the product is sold).** ~~Each market has two components: a product market and a geographic market.~~

DIRECTIONS FOR USE

See instructions that follow explaining the concepts of product market and geographic market: 3113, *Rule of Reason—"Product Market" Explained,* and 3114, *Rule of Reason—"Geographic Market" Explained.*

SOURCES AND AUTHORITY

- "[C]ase law holds that the need to prove market power is a threshold consideration in an antitrust case and is the sine qua non of recovery." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681 [60 Cal.Rptr.2d 195], footnote omitted.)

- " 'To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. ... Ordinarily, a plaintiff to do

this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 542 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "As a practical matter, market power is usually equated with market share. 'Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.' " (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 704 [248 Cal.Rptr. 1819], internal citation omitted.)

- "By reducing the substitutability of products, a high level of product differentiation results in relative inelasticity of cross-product demand. This inelasticity creates opportunities for suppliers to manipulate the price and quantity of goods sold or to entrench their market position by creating barriers to entry in a market." (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 706–707 [248 Cal.Rptr. 1819], footnote omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3113
Rule of Reason—"Product Market" Explained

A product market consists of all [*products/services*] that can reasonably be used for the same purpose. [*Products/services*] are not in the same product market if users are not likely to substitute one for the other. To define the product market, you must determine what [*products/services*] are in the market in which [*name of defendant*] is claimed to have carried out its restraint of trade. [~~Plaintiff~~*Name of plaintiff*] claims that the product market is [*insert*]. [~~Defendant~~*Name of defendant*] claims that the product market is [*insert*].

In deciding whether products are reasonable substitutes, you may consider whether an increase in the price of one product would cause customers of that product to switch to a second product. If so, these two products are more likely to be in the same market. If a significant increase in the price of one product does not cause a significant number of consumers to switch to a second product, these products are less likely to be in the same market. ~~[name of plaintiff] claims that the product market is [insert claimed product market, e.g., "paper clips"]. [Name of defendant] claims that the product market is [insert claimed product market, e.g., "all paper fasteners"].~~

To define the product market, you must determine which [products/services] are in the market in which [*name of defendant*] is claimed to have carried out its restraint of trade.

A product market consists of all [*products/services*] that can reasonably be used for the same purpose. [*Products/services*] are not in the same product market if users are not likely to substitute one for the other.

In deciding whether products are reasonable substitutes, you may consider whether a small increase in the price of one product would cause a considerable number of customers of that product to switch to a second product. If so, these two products are likely to be in the same market. If a significant increase in the price of one product does not cause a significant number of consumers to switch to a second product, these products are not likely to be in the same market.

DIRECTIONS FOR USE

The word "services" should be substituted for "products" wherever that word appears if the case concerns services instead of products.

In some cases, an example may be helpful to illustrate the principle of "reasonable interchangeability," such as the following. Of course, this example may be modified to best suit the facts of the case.

> If the price of a loaf of whole wheat bread increases by 10 or 15 cents, a considerable number of customers may decide to purchase white bread instead. Although these products are somewhat different, they may be reasonably interchangeable for purposes of making toast and sandwiches. They are likely then to be in the same relevant product market. However, the relationship between whole wheat bread and other bread products may be different. Thus, customers may not believe hot dog buns as quite so interchangeable. Therefore, a 10, 15, or even 50-cent increase in the price of a loaf of wheat bread is not likely to cause too many customers to buy hot dog buns instead. These two products, then, are not likely to be in the same relevant market.

SOURCES AND AUTHORITY

- "The United States Supreme Court has declared that the relevant market is determined by considering 'commodities reasonably interchangeable by consumers for the same purposes.' Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1682 [60 Cal.Rptr.2d 195], internal citations omitted.)

- "In antitrust law, the interchangeability of products is usually considered in the definition of markets; the boundary of a relevant market is defined by a significant degree of product differentiation." (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 705 [248 Cal.Rptr. 1819].)

3114
Rule of Reason—"Geographic Market" Explained

A geographic market is the area where buyers turn for alternate sources of supply or where sellers normally sell. The geographic market may or may not be the same as the area where the parties in this case currently compete or do business. It may be smaller or larger than that area. [*Name of plaintiff*] claims that the relevant geographic market is [*insert*]. [*Name of defendant*] claims that the relevant geographic market is [*insert*].

A geographic market may be limited to the area where a product can be shipped and sold profitably. If the cost of transporting a product into or out of the claimed geographic market is large compared to the value of the product, then the geographic is likely to e that area in which shipping costs are inconsequential when compared to the product's price or cost.

In deciding whether products are in the same geographic market, you may consider whether an increase in the price of the product in one area would cause customers in that area to buy the product in another area. If so, these two areas are more likely to be in the same geographic market. If a significant increase in the price in one area does not cause a significant number of consumers to buy the product in another area, these areas are less likely to be in the same geographic market. ~~**[**Name of plaintiff**] claims that the relevant geographic market is [**identify area, e.g., "the city of Los Angeles"**]. [**Name of defendant**] claims that the relevant geographic market is [**identify area, e.g., "the state of California**].**~~

~~**A geographic market is the area where buyers turn for alternate sources of supply or where sellers normally sell. The geographic market may or may not be the same as the area where the parties in this case currently compete or do business. It may be smaller or larger than that area.**~~

~~**A geographic market may be limited to the area where a product can be shipped and sold profitably. You may consider whether purchasing patterns are so different in the two areas that products sold in one area tend not to be sold in another. For example, this might occur if the cost of transporting a product into or out of the claimed geographic market is large compared to the value of the product.**~~

~~In deciding whether products are in the same geographic market, you may consider whether a small increase in the price of the product in one area would cause a considerable number of customers in that area to buy the product in another area. If so, these two areas are likely to be in the same geographic market. If a significant increase in the price in one area does not cause a significant number of consumers to buy the product in another area, these areas are not likely to be in the same geographic market.~~

DIRECTIONS FOR USE

The word "service" should be substituted for "product" wherever that word appears if the case concerns services rather than products.

In some cases an example may be helpful to illustrate the terms used. Regarding the significance of price increases, an example like that given in the Directions for Use in instruction 3113, *Rule of Reason—"Product Market" Explained* may be adapted. Regarding the significance of customer purchasing patterns, the following example may suffice:

> Retail customers are not likely to travel too far to buy shoes. So, a product market defined as "shoe stores" is not likely to include shoe stores in two towns that are 25 miles from each other. However, if the product market is for an inventory of shoes purchased by shoe stores at wholesale, the geographic market is likely to be nationwide, since shoe stores are likely to purchase shoes no matter where companies distributing shoes are located.

Regarding the significance of transporting costs, the following example may suffice:

> Gravel, which is relatively cheap but heavy, and therefore relatively costly to ship, is likely to compete in a narrower geographic market than computer software, which, if valued by weight, is more costly per pound than gravel but also much less costly to ship. Accordingly, a geographic market defined as a city or a region may be appropriate for assessing gravel competition, while a nationwide, or even worldwide, geographic market may be more appropriate for assessing the competition between software sellers.

SOURCES AND AUTHORITY

- The "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the

purchaser can practicably turn for supplies." (*U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 359 [83 S.Ct. 1715, 10 L.Ed.2d 915].)

- "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the ' " 'area of effective' " competition ... where buyers can turn for alternate sources of supply.' " (*Oltz v. St. Peter's Community Hospital* (9th Cir. 1988) 861 F.2d 1440, 1446, internal citations omitted.)

3115
Tying—Per Se Violation—Essential Factual Elements
(Bus. & Prof. Code, § 16720)

A "tying arrangement" exists when a seller conditions the sale of one product, called the "tying product," on the buyer's purchase of a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product. [*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***insert***] is the tying product and [***insert***] is the tied product.** ~~[Name of plaintiff] claims that there is an unlawful tying arrangement in which [specify the particular real estate, product, or services] is the tying product and [specify the particular real estate, product or services] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Four would be the tying product and the sugar the tied product.~~

To establish this claim against [*name of defendant***], [***name of plaintiff***] must prove the following:**

1. **That [***tying item***] and [***tied item***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying item***] only if the buyer also purchases [***tied item***], or that [***name of defendant***] sold [***tying item***] and required or otherwise coerced buyers to [also purchase [***tied item***]] [agree not to purchase [***tied item***] from any other supplier];**

3. **That [***name of defendant***] has sufficient economic power in the market with respect to [***tying item***] to coerce at least some buyers** ~~That [name of defendant] has sufficient economic power in the market for [tying item] to coerce at least some buyers~~ **of [***tying item***] into [purchasing [***tied item***]] [agreeing not to purchase [***tied item***] from a competitor of [***name of defendant***]];**

4. **That the conduct involves a substantial amount of sales, in terms of the total dollar value of [***tied product or service***]; and**

5. That [*name of plaintiff*] was financially harmed; and

6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

DIRECTIONS FOR USE

This instruction is written for claims brought under Business and Professions Code section 16720. A claim under this section may involve products, land, or services as the tying item and products, land, or services as the tied item. Section 16720 applies a stricter test for tying than Business and Professions Code section 16727. Therefore, if products are the tying item and products or services the tied item, the following instruction, pertinent to section 16727, should be used instead.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

Where the "tying product" is land and the "tied product" is a service or a commodity, logic suggests that the first element, i.e., their distinctness, is beyond dispute and that trying to adapt the bracketed language to such an alleged tie-in may create confusion. In such a case, the court may recite this element, then advise the jury that it has been established by the plaintiff or is undisputed by the defendant. The word "parcels," "lots," or similar terms should be used where both items are land, as in such cases the separateness of the tying and tied land could be in dispute.

SOURCES AND AUTHORITY

- Business and Professions Code section 16720 provides:

  A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.
(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:
(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.
(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.
(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.
(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

- "Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forego their free choice between competing tied products. Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "Case law construing Business & Professions Code section 1627 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition

in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrision v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

- "The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (*Freeman, supra,* 77 Cal.App.4th at p. 184, internal citations omitted.)

- "The elements of a per se tying arrangement violative of section 16720 are: '(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' " *(Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 541–542 [78 Cal.Rptr.2d 133], internal citations omitted.)

- " ' "[T]ying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." ' " (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542 [161 Cal.Rptr. 811], internal citations omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 549 [161 Cal.Rptr. 811], internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3116
Tying—Essential Factual Elements
(Bus. & Prof. Code, § 16727)

A "tying arrangement" exists when a seller conditions the sale of one product, called the "tying product," on the buyer's purchase of a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product. [*Name of plaintiff*] claims that there is an unlawful tying arrangement in which [*insert*] is the tying product and [*insert*] is the tied product. ~~[Name of plaintiff] claims that there is an unlawful tying arrangement in which [specify the particular product] is the tying product and [specify the particular product or services] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if the a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.~~

To establish this claim, [*name of plaintiff***] must prove the following:**

1. **That [***tying item***] and [***tied product or service***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying product***] only if the buyer also purchases [***tied product or service***], or that [***name of defendant***] sold [***tying product***] and required or otherwise coerced buyers [to also purchase [***tied product or service***] [or to agree not to purchase [***tied product or service***] from any other supplier];**

3. ~~That [insert one or both of the following]:~~

   ~~[[name of defendant] has sufficient economic power in the market for [tying product] to coerce at least some~~ That [*name of defendant*] has sufficient economic power in the market with respect to [*tying item*] to coerce at least some buyers ~~consumers~~ **into purchasing [***tied product or service***];] [or]**

[the claimed tying arrangement has restrained competition for a substantial amount of sales, in terms of total dollar volume of [*tied product or service*]; ~~**and**~~

4. That [*name of plaintiff*] was financially harmed; and

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

DIRECTIONS FOR USE

This instruction applies to claims under Business and Professions Code section 16727, which applies only where the tying product consists of "goods, merchandise, machinery, supplies, [or] commodities" and the tied product consists of "goods, merchandise, supplies, commodities, or services." Section 16727 does not apply if the tying product is land or services, nor does it apply if the tied product is land.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

SOURCES AND AUTHORITY

- Business and Professions Code section 16727 provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen

competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

- "In sum, in order to prove an illegal per se tying arrangement there must be a showing that: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, (4) the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542–543 [161 Cal.Rptr. 811], internal citations omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes, supra,* 101 Cal.App.3d at p. 549, internal citation omitted.)

- "Case law construing Business and Professions Code section 16727 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3117
Tying—"Separate Products" Explained

In deciding whether [*tying item*] and [*tied item*] are separate and distinct, you should consider, among other factors, the following:

~~(a)~~1. Whether competitors offer to sell the [*tied ~~product or service~~ item*] separately from the [*tying ~~product or service~~ item*] or only as a unit;

~~(b)~~2. Whether the combined product is composed of varying assortments of component parts;

~~(c)~~3. Whether buyers are or can be charged separately for the [*products/services*]; and

~~(d)~~4. Whether [*name of defendant*] ever sells or offers to sell the [*tied ~~product or service~~ item*] separate from the [*tying ~~product or service~~ item*].

This list is not exhaustive. No one of these factors need be present in order for you to conclude that the [*tying item*] and the [*tied item*] are separate and distinct [*items*]. You should give each factor the weight you believe it warrants under the circumstances. ~~Not all of these factors need be present in order for you to conclude that the [tying product or service] and the [tied product or service] are separate and distinct [products or services, etc.].~~

DIRECTIONS FOR USE

If an example is thought to be in order, users may wish to consider the following:

> For example, even though belt buckles are sometimes sold separately from belts, a belt buckle is normally considered a component of a belt. Therefore, a belt and buckle would normally be considered one product under the law in this case. On the other hand, while belts and wallets are sometimes packaged and sold together, they are not normally considered components of a single product and are normally purchased separately. Therefore, belts and wallets would normally be considered two separate products under the law in this case.

SOURCES AND AUTHORITY

- "Although we have not found … any definitive test for the determination of this question, the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only as a unit. (2) Whether the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are or can be charged separately for the allegedly separate products or services. (4) Whether the defendant ever sells or offers to sell the products or services separately." (*Corwin v. Los Angeles Newspaper Service Bur.* (1971) 4 Cal.3d 842, 858–859 [94 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3118
Tying—"Economic Power" Explained

In determining whether [*name of defendant*] has sufficient economic power in the market for [*tying item*], you may consider whether [*name of defendant*] has such a large share of the market for [*tying* ~~*product or service*~~ *item*] that buyers do not have alternate sources of [*tying* ~~*product or service*~~ *item*] or a reasonably available substitute. If [*name of defendant*] has economic power, it may be established even though it exists with respect to some, but not all, buyers.

You may also consider whether a buyer would be unable to easily locate a similar or equally desirable product in the marketplace. If buyers do not generally consider other products to be substitutes, this fact may give [*name of defendant*] economic power over *tied item*]. The fact that [*name of defendant*] can produce [*tying* ~~*product or service*~~ *item*] in an efficient manner or at a high level of quality does not, by itself, mean that competitors do not offer a similar product.

DIRECTIONS FOR USE

This instruction assumes that the plaintiff is seeking relief under Business and Professions Code Section 16720. If the plaintiff is instead seeking relief under Business and Professions Code Section 16727, this element is not required, so long as the plaintiff proves that the claimed tie-in affected a "not insubstantial amount" of sales of the tied product.

SOURCES AND AUTHORITY

- "[W]e emphasize that the power over the tying product … can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 544 [161 Cal.Rptr. 811], internal citations omitted.)

- "Decisions of the United States Supreme Court 'have made unmistakably clear that the economic power over the tying product can be sufficient even though the power

falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.' " (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858 [94 Cal.Rptr. 785], internal citation omitted.)

- "Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "To plead this element, appellants must allege facts to show that 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 542 [78 Cal.Rptr.2d 133], internal citation omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06D
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

3119
"Noerr-Pennington" Doctrine

[*Name of defendant*] claims that [*his/her/its*] agreement with [*other person*] did not violate the law because [*he/she/it*] was trying in good faith to influence government action. [*Name of plaintiff*] claims that this action was a sham or a pretext to restrain competition.

To establish [*his/her/its*] claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*]'s actions before [*name of governmental body*] were undertaken without regard to the merits; and**

2. **That the reason [*name of defendant*] engaged in [*specify the petitioning activity, e.g., "filing an objection to an environmental impact report"*] was to use the [*specify the claimed process, e.g., "environmental agency approval"*] process to harm [*name of plaintiff*] by [*specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"*], rather than to obtain a successful outcome from that process. If you conclude that [*name of defendant*] was trying in good faith to influence government action, it is irrelevant that [*name of plaintiff*] or another competitor or customer was harmed as a result.**

SOURCES AND AUTHORITY

- "The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive. An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 574–575 [29 Cal.Rptr.2d 646], internal citations omitted.)

- "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718], internal citations omitted.)

- " 'The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.' " (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 576, internal citations omitted.)

- "[T]he sham exception 'encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' It 'involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means' " ' " (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 577, internal citations omitted.)

- "[W]e hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 579.)

- "While the *Noerr-Pennington* doctrine was formulated in the context of antitrust cases, it has been applied or discussed in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at pp. 577–578, internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.11
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 578

3120
Affirmative Defense—*In Pari Delicto*

[*Name of defendant*] claims that [*name of plaintiff*] may not recover because [*name of plaintiff*] is equally responsible for the harmful conduct. To succeed, [*name of defendant*] must prove the following:

1. **That [*name of plaintiff*] and [*name of defendant*] have substantially equal economic strength;**

2. **That [*name of plaintiff*] is at least equally responsible for the harmful conduct as [*name of defendant*]; and**

3. **That [*name of plaintiff*] was not compelled by economic pressure to engage in the harmful conduct.**

SOURCES AND AUTHORITY

- "Cases … have declared that if a plaintiff does not bear equal responsibility for establishing the illegal scheme, or if he is compelled by economic pressures to accept such an agreement, he cannot be barred from recovering because he participated therein." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 381 [143 Cal.Rptr. 1], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.13
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

State Bar Committee Comments on Proposed Changes:

The Committee was divided as to whether there is an in pari delicto affirmative defense under California law. U.S. Audio & Copy Corp. v. Phillips Bus. Sys. Inc., 1983 WL 1818 (N.D. Cal. 1983) describes the existence of an in pari delicto defense is a "hotly contested issue". An in pari delicto instruction appears in ANTITRUST AND TRADE REGULATION LAW SECTION OF THE STATE BAR OF CALIFORNIA, CALIFORNIA ANTRITRUST LAW JURY INSTRUCTIONS (1998) and at least arguably appears in Mailand v. Burke and THI-Hawaii, Inc. v. First Commerce Financial Corp.,627 F.2d 991 (9th Cir. 1980).

The Task Force should consider what guidance should be provided in light of conflicting authorities

3121
Damages

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was a direct result or likely consequence that was caused by [*name of defendant*], even if the harm could not have been anticipated.

~~**[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [nam eof plaintiff] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**~~

[*Name of plaintiff*] does not have to prove the exact amount of the lost profits, but there must be a reasonable basis for computing the loss. [*Name of plaintiff*] must provide enough evidence of the [*total/gross*] amount of profits that would have been received, and of the costs that would have been incurred, so that you can reasonably estimate the amount of loss profits without speculating or guessing.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **[Loss of reasonably anticipated sales and profits];**

2. **[An increase in [*name of plaintiff*]'s expenses];**

3. **[*insert other applicable item of damage*].**

In performing this calculation, you should only calculate those damages that are attributable to [*name of defendant*]'s behavior. If you conclude that factors other than [*name of defendant*]'s behavior also harmed [*name of plaintiff*], you should take this conclusion into account when calculating [*name of plaintiff*]'s damages.

SOURCES AND AUTHORITY

- Section 16750 (a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "'[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other cases, that defendants' wrongful acts had caused damage to the plaintiffs.'(cites omitted.)" (*Diesel Electric Sales and Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 219-220)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 10.06E, 12.05, 12.07
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 585